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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1987

MAY 16 THROUGH JUNE 17, 1988

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

FRANK D. WAGNER

REPORTER OF DECISIONS

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ERRATUM

414 U. S. 466, line 2: delete "discontinuance procedures contained in 49 U. S. C. § 13a. 45 U. S. C." and add "The Rail Passenger Service Act of 1970, 45 U. S. C."

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.
ANTONIN SCALIA, Associate Justice.
ANTHONY M. KENNEDY, Associate Justice.

RETIRED

WARREN E. BURGER, Chief Justice.
LEWIS F. POWELL, Jr., Associate Justice.

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective February 18, 1988, *viz.:*

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, ANTONIN SCALIA, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

February 18, 1988.

(For next previous allotment, and modifications, see 479 U. S., p. V, 483 U. S., pp. V, VI, and 484 U. S., pp. V, VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1987

UNITED STATES DEPARTMENT OF JUSTICE ET AL. *v.* JULIAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86–1357. Argued January 19, 1988—Decided May 16, 1988

The two respondents are federal prison inmates whose requests for copies of their presentence investigation reports were denied by the Parole Commission. Pursuant to Federal Rule of Criminal Procedure 32(c), a probation officer prepares the presentence report, which contains background information about the defendant and the circumstances of his offense, for use by the district court at sentencing. Under the Rule, the court, before imposing sentence, must permit the defendant and his counsel to read the report, except portions, *inter alia,* containing diagnostic opinions, confidential sources of information, or information that, if disclosed, might cause harm to the defendant or others. After sentencing, the reports are typically transmitted to the Bureau of Prisons for its use, and then—pursuant to the Parole Commission and Reorganization Act of 1976 (Parole Act)—are sent to the Parole Commission for eventual use in determining whether a prisoner should be paroled. The Parole Act provides that before a scheduled parole hearing is held, the prisoner must be given reasonable access to the report, but exempts the same three categories of information as Rule 32(c). After the Parole Commission denied their disclosure requests, respondents filed separate suits under the Freedom of Information Act (FOIA), and the District Courts ordered disclosure. Consolidating petitioners' appeals, the Court of Appeals affirmed. It rejected petitioners' contentions that presentence reports are exempt from disclosure under both

Exemption 3 and Exemption 5 of the FOIA. Exemption 3 pertains to matters that are "specifically exempt[ed] from disclosure" by another statute that "refers to particular types of matters to be withheld." Exemption 5 makes the FOIA inapplicable to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

Held: The FOIA requires that the presentence reports be disclosed by petitioners, except as to matters relating to confidential sources, diagnostic opinions, and possibly harmful information. Pp. 8–14.

(a) Beyond protecting from disclosure the matters noted above, neither Rule 32(c) nor the Parole Act satisfies Exemption 3's requirements. Recent changes, leading to their present provisions, have been made in both the Rule and the Parole Act, not to protect the presentence report from disclosure, but to ensure that it would be disclosed to the defendant who is about to be sentenced or who is up for parole. Although Rule 32's provision requiring that all copies of reports furnished under the Rule be returned to the court, unless it directs otherwise, qualifies somewhat the defendant's access to the presentence report when it is furnished by the district court in the context of sentencing, it does not convert the Rule, a part of which is essentially designed to mandate disclosure, into a statute that "specifically exempt[s] from disclosure" for purposes of Exemption 3. Moreover, the Parole Act does not contain a similar provision. Pp. 8–11.

(b) Exemption 5 of the FOIA does not support withholding of the presentence reports. The Exemption incorporates the privileges which the Government enjoys under relevant statutory and case law in the pretrial discovery context. The test under the Exemption is whether the documents would be "routinely" or "normally" disclosed upon a showing of relevance. Although in both civil and criminal cases the courts have been reluctant to give a *third party* access to the presentence report prepared for some other individual in the absence of a showing of special need, a similar restriction on discovery is not applicable when the individual requesting discovery is the subject of the report. The thrust of the disclosure portions of Rule 32(c) and the Parole Act speaks strongly against the existence of a Government privilege when the disclosure request is from the subject of the report. In this context, nothing in the case law or Exemption 5 prevents the conclusion that disclosure of presentence reports to the individual who is the subject of the report is "routine." *FTC* v. *Grolier Inc.*, 462 U. S. 19, distinguished. Pp. 11–14.

806 F. 2d 1411, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which WHITE and O'CONNOR, JJ., joined, *post*, p. 15. KENNEDY, J., took no part in the consideration or decision of the case.

Edwin S. Kneedler argued the cause for petitioners. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Cohen, Leonard Schaitman,* and *Sandra Wien Simon.*

Eric R. Glitzenstein argued the cause for respondents. With him on the briefs were *Katherine A. Meyer* and *Alan B. Morrison.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents in this case are prison inmates who sued under the Freedom of Information Act (FOIA), 5 U. S. C. § 552, for disclosure of their presentence investigation reports. These reports are prepared by a probation officer for use by the district court at sentencing; they contain background information about a defendant and the circumstances of his offense. After sentencing, the reports are typically transmitted to the Bureau of Prisons and then to the Parole Commission for eventual use in determining whether a prisoner should be released on parole. The courts below ordered petitioners—the Department of Justice and the Parole Commission—to disclose the reports. The question we are now called on to decide is whether the FOIA requires that these presentence investigation reports be disclosed by petitioners or whether the reports fall under one of the FOIA's statutory exemptions.

Rule 32(c) of the Federal Rules of Criminal Procedure outlines the requirements for preparation and disclosure of a presentence report for a criminal defendant who has been adjudged guilty. Rule 32(c)(1) provides that before imposition of sentence the probation service of the district court shall make an investigation into the defendant's background and the circumstances of the offense.[1] The results of the investigation are compiled into a report, which under Rule 32(c)(2) must contain the defendant's prior criminal record, a description of the circumstances of the offense and the defendant's behavior, a discussion of the loss or harm suffered by any victims of the offense, and any other information that might aid the court in sentencing, including the restitution needs of the victim.

The Rule also specifies the procedure by which the court is to disclose the report and its contents to a defendant. Rule 32(c)(3)(A) states that "[a]t a reasonable time before imposing sentence the court shall permit the defendant and his counsel to read the report . . . exclusive of any recommendation as to sentence." The court may not disclose, however, portions of the report that contain "diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons." *Ibid.* If the report does contain this type of information, the court is required to give orally or in writing a summary of the factual information that has been withheld and that is to be relied on in determining an appropriate sentence. Once the report has been disclosed, the defendant and his counsel are to be given an opportunity to comment on the report and to introduce evidence showing that the report contains factual inaccuracies. Rule 32(c)(3)(E) also provides that "[a]ny copies of the presentence investigation report made available to the defendant and his counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs."

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[1] No presentence investigation is required if, with the permission of the court, the defendant waives the report, or if the court finds that there is already sufficient information in the record to enable a meaningful exercise of the court's sentencing discretion. If the court finds that no report is necessary, it must explain this finding on the record. Fed. Rule Crim. Proc. 32(c)(1).

After the defendant is sentenced, a copy of the presentence report is typically transmitted to the Bureau of Prisons, where it may be used in determining a defendant's classification as an inmate, see 28 CFR §§524.10, 524.12(e) (1987), choosing an appropriate treatment program, or deciding eligibility for various privileges. See Brief for Petitioners 7 (citing Fennell & Hall, Due Process at Sentencing, 93 Harv. L. Rev. 1615, 1679 (1980)).[2] A copy of the presentence report is also transmitted to the United States Parole Commission pursuant to §2(e) of the Parole Commission and Reorganization Act of 1976 (Parole Act),[3] 18 U. S. C. §4205(e), which makes it the "duty of the . . . probation officers" to furnish "information available to such officer . . . concerning any eligible prisoner or parolee" to the Commission upon request. The Parole Commission is then required by statute to consider the report, among other documents, in making a parole decision. § 4207(3).

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[2] This use of the presentence report by the Bureau of Prisons is not required by statute, although it has apparently been the practice for some time. See Fennell & Hall, 93 Harv. L. Rev., at 1679. Indeed, the Advisory Committee Notes to the 1983 Amendments to Rule 32(c) expressly note the practice of transmitting the report to the Bureau of Prisons. See 18 U. S. C. App., p. 995 (1982 ed., Supp. IV), 97 F. R. D. 245, 306, 308 (1983).

[3] The Comprehensive Crime Control Act of 1984, Pub. L. 98–473, Tit. II, ch. 2, 98 Stat. 1987, has significantly revised the federal system of sentencing that was in place at the time the Parole Act was adopted in 1976. Most importantly, the Crime Control Act mandates that all sentences of imprisonment shall be for fixed terms, see 18 U. S. C. §§3581, 3582(a) (1982 ed., Supp. IV), and eliminates the possibility of release on parole prior to the end of a sentence, §§3621(a), 3624(a). Accordingly, the Crime Control Act also provided that the Parole Act was to be repealed on November 1, 1987, when the new sentencing provisions went into effect. The Parole Commission will continue to operate for five years, however, in order to make parole decisions for individuals sentenced before November 1, 1987. During this 5-year period, the Parole Act will remain in effect as to those individuals. Pub. L. 98–473, §235(b)(1)(A), 98 Stat. 2032. Thus, although the Parole Commission is to be phased out, it will still be handling presentence reports for individual defendants for some time. The Government also points out that even after the Parole Commission is dissolved, the Bureau of Prisons will continue to receive copies of presentence reports from the district courts.

The Parole Act also requires that, at least 30 days before a scheduled parole hearing, the prisoner be provided with "reasonable access to [the] report or other document to be used by the Commission in making" its parole determination. § 4208(b). As in Rule 32(c)(3)(A), however, the Act exempts from this disclosure requirement the same three categories of information—diagnostic opinions, confidential information, and potentially harmful information—that were protected from disclosure by the district court. The Act also requires that if any such information is excluded from disclosure, it is the duty of the Commission (or any other agency) "to summarize the basic contents of the material withheld . . . and furnish such summary to the inmate." § 4208(c)(3); see also 28 CFR § 2.55(c) (1987).[4] The Parole Act does not contain, however, any express requirement that the inmate return all or any copies of the documents to which he is given "reasonable access."

The present case stems from two separate requests by individual inmates for copies of their presentence reports. In 1984, respondent Kenneth Michael Julian, an inmate in federal prison in Arizona, asked the Parole Commission to furnish him with a copy of his presentence report. When his request was denied, Julian brought this FOIA suit against the Department of Justice in the United States District

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[4] According to the Government, the usual practice is for the probation officer to identify any information that was excluded by the district court and to provide the Commission with copies of the summaries that were used by the court. Brief for Petitioners 9 (citing Probation Division, Administrative Office of the United States Courts, The Presentence Investigation Report 2 (1984)).

Court for the District of Arizona. In a brief order, the District Court granted Julian's motion for summary judgment and ordered the Government to comply with his request. In 1984, respondent Margaret J. Wallace, then an inmate in federal prison in California, filed a FOIA request with the Parole Commission for all of the Commission's records pertaining to her. The Commission honored her request in large part, but refused to turn over a copy of her presentence report. Wallace then filed suit against the Parole Commission[5] in the United States District Court for the Northern District of California. This court, too, ordered that the presentence report be released.

The two cases were consolidated on appeal before the United States Court of Appeals for the Ninth Circuit, which affirmed the judgment in each. 806 F. 2d 1411 (1986). After first stating that the presentence reports are "agency records" for purposes of the FOIA,[6] the court rejected the Government's contentions that presentence reports are exempt from disclosure under both 5 U. S. C. § 552(b)(3) (Exemption 3) and § 552(b)(5) (Exemption 5). While certain parts of the presentence reports may be withheld pursuant to Rule 32(c)(3) and the Parole Act, 18 U. S. C. § 4208(c), the court found that "neither Exemption 3 nor Exemption 5 provides a blanket exemption for presentence investigation reports" when the FOIA request is made by the subject of the presentence report. 806 F. 2d, at 1416. The court also rejected the Government's argument that the FOIA's disclosure requirements were superseded by the special statutory procedures for obtaining presentence reports set out in Rule

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[5] She also named as a defendant in her action Charles Turnbo, the warden of the prison in which she was incarcerated. The apparent reason for this is that Wallace brought her action as a petition for habeas corpus pursuant to 28 U. S. C. § 2241. The District Court, however, treated her claim as a suit against an agency under the FOIA. See 5 U. S. C. § 552(a)(4)(B).

[6] The Government does not dispute this conclusion on this appeal.

32(c) and the Parole Act. Because this decision of the Court of Appeals conflicts with an earlier decision of the United States Court of Appeals for the District of Columbia Circuit, see *Durns* v. *Bureau of Prisons*, 256 U. S. App. D. C. 156, 804 F. 2d 701, rehearing en banc denied, 257 U. S. App. D. C. 30, 806 F. 2d 1122 (1986), cert. pending, No. 86-6550, and because it raises several important statutory issues, we granted certiorari, 482 U. S. 926 (1987), and we now affirm.

The system of disclosure established by the FOIA is simple in theory. A federal agency must disclose agency records unless they may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b). See *United States* v. *Weber Aircraft Corp.*, 465 U. S. 792, 793-794 (1984). Congress created these exemptions because it "realized that legitimate governmental and private interests could be harmed by release of certain types of information." *FBI* v. *Abramson*, 456 U. S. 615, 621 (1982); see also *CIA* v. *Sims*, 471 U. S. 159, 167 (1985). Nonetheless, "[t]he mandate of the FOIA calls for broad disclosure of Government records," *id.*, at 166, and for this reason we have consistently stated that FOIA exemptions are to be narrowly construed, see *Abramson*, *supra*, at 630; *Department of Air Force* v. *Rose*, 425 U. S. 352, 361 (1976). With this principle in mind, we turn to consider whether, as the Government contends, presentence investigation reports are exempted from disclosure under either FOIA Exemption 3 or Exemption 5.

Exemption 3 of the FOIA permits agencies to withhold matters that are

> "specifically exempted from disclosure by statute . . . , provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." § 552(b)(3).

The Government argues that this Exemption applies to presentence reports because Rule 32(c) and the Parole Act are statutes that specifically exempt the reports from disclosure and that "refer to particular types of matters to be withheld." To some extent this is clearly true: both the Rule and the Parole Act specifically exempt from disclosure any information in the report that relates to confidential sources, diagnostic opinions, and other information that may cause harm to the defendant or to third parties. See Rule 32(c)(3)(A); 18 U. S. C. § 4208(c). This information is thus exempt from disclosure under the FOIA.

Beyond this, however, neither the Rule nor the Act satisfies the requirements of Exemption 3. Both provisions have been recently changed, not to protect the presentence report from disclosure, but to ensure that it would be disclosed to the defendant who is about to be sentenced or who is up for parole. For example, in 1966, Rule 32(c) was amended to give sentencing courts the discretion to disclose the reports to defense attorneys and prosecutors. The Advisory Committee Notes indicate that the purpose of this amendment was:

> "[T]o make it clear that courts may disclose all or part of the presentence report to the defendant or to his counsel. It is hoped that courts will make increasing use of their discretion to disclose so that defendants generally may be given full opportunity to rebut or explain facts in presentence reports which will be material factors in determining sentences." 18 U. S. C. App., p. 625, 39 F. R. D. 69, 194 (1966).

Congress amended the Rule again in 1974,[7] this time changing it to state that "[b]efore imposing sentence the court shall *upon request* permit the defendant, or his counsel . . . , to read the report of the presentence investigation," Pub. L. 94–64, 89 Stat. 376 (emphasis added). In 1983, after an empirical study revealed that "the extent and nature of disclosure of the presentence investigation report in federal courts under current rule 32 is insufficient to ensure accuracy of sentencing information," Advisory Committee Notes, 18 U. S. C. App., p. 996 (1982 ed., Supp. IV), 97 F. R. D. 245, 307 (1983), Congress made additional changes in the Rule. It made disclosure of the report mandatory by eliminating the request requirement; it authorized disclosure to both the defendant and defense counsel; and it required that disclosure be made at a reasonable time before sentencing.

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[7] The amendments became effective on December 1, 1975.

All of this makes clear that the Rule serves two purposes: it prevents disclosure of the three categories of information described above, but it facilitates disclosure of the balance of the report to the defendant. Similarly, the provision of the Parole Act dealing with presentence reports is also designed to ensure that much of the information on which a parole decision is to be based, including the presentence report, be disclosed to the potential parolee. In line with this intent, Congress expressly required that all prisoners be furnished with "reasonable access" to the pertinent documents at least 30 days before a parole hearing. § 4208(b).

The Government argues that while Congress did intend that defendants be given some access to their presentence reports, it also sought to limit that access by requiring that all copies of reports that are furnished pursuant to Rule 32(c) be returned to the court, unless the court directs otherwise. Fed. Rule Crim. Proc. 32(c)(3)(E). As stated in the Advisory Committee Notes, the purpose of this provision was "to insure that [the reports] do not become available to unauthorized persons." 18 U. S. C. App., p. 627, 62 F. R. D. 271, 325 (1974). Admittedly this provision does qualify somewhat the defendant's access to his or her presentence report when that report is furnished by the district court in the context of sentencing, but in our opinion it does not convert the Rule, a part of which is essentially designed to mandate disclosure, into a statute that "specifically exempt[s] from disclosure" for purposes of Exemption 3 of the FOIA. And, the Parole Act, which governs the Parole Commission's duties in regard to disclosure of presentence reports, does not itself contain a similar provision. The Act only requires that "reasonable access" to the report be given; there is no express limitation on an inmate's power to retain a copy of the report. Even if we assume, as the Government suggests, that the Parole Act implicitly adopts the restriction contained in Rule 32(c)(3)(E), this would still not convert § 4208 into an Exemption 3 statute. Exemption 3 permits an agency to withhold only those parts of a presentence report that are expressly protected by Rule 32(c)(3)(A) or 18 U. S. C. § 4208(c); the remaining parts of the reports are not covered by this exemption, and thus must be disclosed[8] unless there is some other exemption which applies to them.

The Government also relies on Exemption 5 of the FOIA to support withholding of the requested documents. This Exemption makes the FOIA inapplicable to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U. S. C. § 552(b)(5).[9] In the past, we have interpreted this somewhat Delphic provision as "incorporat[ing] the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context." *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U. S. 168, 184 (1975); see also *FTC* v. *Grolier Inc.*, 462 U. S. 19, 26–27 (1983); *Weber Aircraft Corp.*, 465 U. S., at 799. As we stated in *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 149 (1975), Exemption 5 "exempt[s] those documents, and only those documents, normally privileged in the civil discovery context." See also

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[8] Under § 552(b)(9), an agency must supply to a FOIA applicant "[a]ny reasonably segregable portion of a record . . . after deletion of the portions which are exempt."

[9] Respondents argue that presentence memorandums are not "inter-agency" records for purposes of Exemption 5. The Court of Appeals did not address this issue, however, and we do not find it necessary to do so in light of our disposition today.

H. R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966) (the purpose of Exemption 5 is to ensure that "any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public"). Accordingly, "[t]he test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance." *Grolier*, *supra*, at 26.

Both parties agree that in both civil and criminal cases the courts have been very reluctant to give *third parties* access to the presentence investigation report prepared for some other individual or individuals. See, *e. g.*, *United States* v. *McKnight*, 771 F. 2d 388, 390 (CA8 1985); *United States* v. *Anderson*, 724 F. 2d 596, 598 (CA7 1984); *United States* v. *Charmer Industries, Inc.*, 711 F. 2d 1164, 1173–1176 (CA2 1983); *Hancock Brothers, Inc.* v. *Jones*, 293 F. Supp. 1229 (ND Cal. 1968). As the Government points out, one reason for this is the fear that disclosure of the reports will have a chilling effect on the willingness of various individuals to contribute information that will be incorporated into the report. See, *e. g.*, *United States* v. *Martinello*, 556 F. 2d 1215, 1216 (CA5 1977). A second reason is the need to protect the confidentiality of the information contained in the report. Accordingly, the courts have typically required some showing of special need before they will allow a third party to obtain a copy of a presentence report. See, *e. g.*, *Charmer*, *supra*, at 1174–1176 (following *Hancock Brothers, Inc.* v. *Jones*, *supra*, in concluding that a report may not be disclosed "in the absence of a compelling demonstration that disclosure of the report is required to meet the ends of justice").

There is no indication, however, that similar restrictions on discovery of presentence investigation reports have been recognized by the courts when the individual requesting discovery is the subject of the report. Indeed, there seem to be no reported judicial decisions on the subject. By itself, of course, the fact that there are no cases directly on point with respect to this particular category of requests for information is not conclusive evidence that no discovery privilege should be recognized in this situation. From our perspective, however, it appears that the reasoning of the cases denying disclosure to third-party requesters would have little applicability to a request by a defendant to examine his own report, particularly in light of Rule 32(c)'s specific mandate that the report be disclosed to the defendant during sentencing. We note in addition that most privileges of the sort described in Exemption 5 arise as a result of judicial decision. See, *e. g.*, *United States* v. *Reynolds*, 345 U. S. 1, 7–8 (1953). But unless the privilege is constitutionally rooted, Congress may determine for itself which privileges the Government may avail itself of and which it may not. Here, the thrust of the disclosure portions of Rule 32(c) and the Parole Act speaks so strongly against the existence of a privilege on the part of the Government when the request is from the subject of the report that we think it accurate to say that Congress has strongly intimated, if it has not actually provided, that no such privilege should exist.

The Government contends nonetheless that because Exemption 5 applies to documents that "would not be available by law to *a* party . . . in litigation with the agency" (emphasis added), we cannot construe Exemption 5 in such a way as to make an agency's duty to disclose a presentence report turn on the nature or identity of the requester. The Government points to our reasoning in *Grolier*, where we held that documents that were privileged under the work-product doctrine were not "routinely" available for Exemption 5 purposes even though it was possible for some parties seeking discovery to obtain access to the document by showing "substantial need." 462 U. S., at 27. As we stated, "[w]hether its immunity from discovery is absolute or qualified, a protected document cannot be said to be subject to 'routine' disclosure." *Ibid.* Such a result, "by establishing a discrete category of exempt information, implements the congressional intent to provide 'workable' rules." *Ibid.;* see also *EPA* v. *Mink*, 410 U. S. 73, 79 (1973) (the exemptions are "plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed").

Contrary to the Government's contention, however, nothing in *Grolier*, or in the language of Exemption 5, requires that, even though Congress has spoken in the manner that it has, a privilege against disclosure must nonetheless be extended to all requests for these reports, or to none at all. *Grolier* held that the fact that a claim of privilege might be overridden in a particular case by special circumstances did not mean that discovery was "routinely available" within the meaning of Exemption 5. We reaffirm that holding, but we decline the Government's invitation to extend it to circumstances in which there is no basis for a claim of privilege from disclosure against one class of requesters, although there is a perfectly sound basis for resisting disclosure at the behest of another class of requesters. The fact that no one need show a particular need for information in order to qualify for disclosure under the FOIA does not mean that in no situation whatever will there be valid reasons for treating a claim of privilege under Exemption 5 differently as to one class of those who make requests than as to another class. In this case, it seems clear that there is good reason to differentiate between a governmental claim of privilege for presentence reports when a third party is making the request and such a claim when the request is made by the subject of the report. As we noted above, there simply is *no* privilege preventing disclosure in the latter situation. Even under our ruling in *Grolier*, therefore, discovery of the reports by the defendants themselves can be said to be "routine."

Affirmed.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE SCALIA, with whom JUSTICE WHITE and JUSTICE O'CONNOR join, dissenting.

I dissent from today's decision because in my view it fails to perform the fundamental judicial function of reading the body of enacted laws in such fashion as to cause none of them to be pointless; and because in order to achieve that failure it makes a departure, sure to engender confusion and litigation, from the general principle of the Freedom of Information Act that individuating characteristics of requesters are not to be considered. I address each of these points in turn.

I

In 1975, Congress approved Rule 32(c)(3)(E) of the Federal Rules of Criminal Procedure, providing that a defendant cannot retain copies of the presentence report unless the sentencing judge (presumably familiar with the dangerousness of the defendant and his associates) specifically directs. Act of July 31, 1975, Pub. L. 94–64, § 2, 89 Stat. 370. In the 1976 Parole Act, Congress adopted a clause completely consistent with this provision, requiring the Parole Commission, at least 30 days before a scheduled parole hearing, to provide the inmate only "reasonable access" to the report—a term that assuredly does not require, and indeed is ordinarily used specifically to make clear that there is not required, retention of the document. Today the Court holds that all this really does not matter, because the defendant can obtain a copy of the report under the Freedom of Information Act (FOIA), 5 U. S. C. § 552, as soon as it is transferred to the Bureau of Prisons and the Parole Commission after his sentencing.

If the FOIA had been adopted *after* the protective provisions in question, one could at least argue that there had been a change of heart by Congress, and if not repeal by implication at least frustration by implication. But the fact is that the relevant provision of the FOIA was enacted in its current form in 1967, *before* the Federal Rule of Criminal Procedure and Parole Act provisions at issue here, Pub. L. 90–23, 81

Stat. 54. Nonetheless, today's decision converts the Rule 32 requirement that retention be explicitly approved by the sentencing judge into no more than a temporary inconvenience, since the defendant can obtain the document without such approval shortly after his sentencing; and it reduces the Parole Act time and manner limitations (which provide that the duty arises only when a parole hearing has been scheduled, and that the content of the duty is to provide only "reasonable access") to utter meaninglessness.

I am frank to admit that I cannot readily conceive why allowing a defendant or an inmate to keep a copy of the report is significantly more threatening than allowing him to read and make notes about it. Penal and probationary authorities believed otherwise, however—and apparently continue to believe so, as is evident from the 1985 statement of the Chief of the Division of Probation of the Administrative Office of the United States Courts, opposing a proposal that the Parole Commission provide by rule for routine release of copies of presentence reports:

> "[I]t is the position of the Probation Committee of the Judicial Conference of the United States, as well as the Probation Division of the Administrative Office of the U. S. Courts, that permitting a defendant to keep a copy of his presentence report could likely impede the ability of U. S. probation officers to gather information and protect their sources.
>
> . . . . .
>
> "Were a defendant permitted to retain a copy of his report . . . there would be no way to effectively prohibit further disclosure of the information to third parties. This possibility is far more dangerous to a source of information than is the possibility of the defendant revealing his recollection of what he read in the report prior to sentencing.
>
> . . . . .

> "[Rule 32(c)(3)(E)] embodies the concern of the courts that the defendant's retention of the presentence report is normally inimical to the interests of obtaining full and accurate information prior to sentencing." Letter from Probation Chief Chamlee to Chairman of Parole Comm'n Baer, June 17, 1985, App. to Pet. for Cert. 25a–26a.

I have no idea whether this is sound, and neither does the Court. But the issue was obviously addressed by Congress, and resolved in favor of restricted access. We should not frustrate that disposition unless the FOIA unavoidably so requires. As I now proceed to discuss, just the opposite is true: A genuine revolution in accepted FOIA principles is required to produce today's peculiar result.

II

It is too well established to warrant extensive discussion—or at least until today has been—that the FOIA is not meant to provide documents to particular individuals who have special entitlement to them, but rather "to inform the *public* about agency action." *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 143, n. 10 (1975) (emphasis added). In his foreword to an official Justice Department Memorandum for agency guidance describing the then newly enacted FOIA, Attorney General Clark correctly identified as one of the five key concerns of the Act the goal "that *all* individuals have *equal rights of access*." Attorney General's Memorandum on Public Information Section of Administrative Procedure Act, United States Department of Justice iv (June 1967) (emphasis added) (hereinafter AG Memorandum). The scholarly commentators agreed:

> "The Act's sole concern is with what must be made public or not made public. The Act never provides for disclosure to some private parties and withholding from others. The main provision of section 3 says that information is to be made available 'to the public' and the central provision of subsection (c) requires availability of

records to 'any person.'" Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 765 (1967).

What has been true of the FOIA in general has also been true of Exemption 5 in particular, which exempts from mandatory production "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U. S. C. § 552(b)(5).[1] As Attorney General Clark's Memorandum went on to explain, "[t]he effect of exemption (5) is to make available *to the general public* those internal documents from agency files which are routinely available to litigants, unless some other document bars disclosure." AG Memorandum 38 (emphasis added). It has long been established that in applying Exemption 5 the individuating characteristics of the particular requester are not to be considered. As the District of Columbia Circuit put it in the leading case, which we have cited with approval, see *NLRB* v. *Sears, Roebuck & Co.*, *supra*, at 149, n. 16: "The question for decision is . . . whether '"a private party"—not necessarily the applicant—would routinely be entitled to [the agency record] through discovery.'" *Sterling Drug Inc.* v. *FTC*, 146 U. S. App. D. C. 237, 244, 450 F. 2d 698, 705 (1971), quoting from Davis, *supra*, at 796.

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[1] Respondents contend that presentence reports are not "inter-agency or intra-agency memorandums" within the meaning of Exemption 5, since they are prepared by probation officers, who are appointed by and serve under the direction of the courts, see 18 U. S. C. §§ 3602(a) and 3603(8) (1982 ed., Supp. IV), and since courts are not "agencies" for purposes of the FOIA, see 5 U. S. C. §§ 551(1)(B) and 552(f) (1982 ed. and Supp. IV). Although the Court does not reach this issue, see *ante*, at 11, n. 9, I must. Apart from its present context, the most natural meaning of the phrase "intra-agency memorandum" is a memorandum that is addressed both to and from employees of a single agency—as opposed to an "inter-agency memorandum," which would be a memorandum between employees of two different agencies. The problem with this interpretation is that it excludes many situations where Exemption 5's purpose of protecting the Government's deliberative process is plainly applicable. Consequently, the Courts of Appeals have uniformly rejected it, holding the "intra-agency memorandum" exemption applicable to such matters as information furnished by Senators to the Attorney General concerning judicial nominations, see *Ryan* v. *Department of Justice*, 199 U. S. App. D. C. 199, 207–209, 617 F. 2d 781, 789–791 (1980), and reports prepared by outside consultants, see *Government Land Bank* v. *GSA*, 671 F. 2d 663, 665 (CA1 1982). It seems to me that these decisions are supported by a permissible and desirable reading of the statute. It is textually possible and much more in accord with the purpose of the provision, to regard as an intra-agency memorandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency—*e. g.*, in a capacity as employee or consultant to the agency, or as employee or officer of another governmental unit (not an agency) that is authorized or required to provide advice to the agency. Here we have a memorandum that fits readily within this definition. See Fed. Rule Crim. Proc. 32(c)(3)(D) (referring to "any copy of the presentence investigation report

We approved this principle in *EPA* v. *Mink*, 410 U. S. 73 (1973), a FOIA suit brought by 33 Members of the House of Representatives, saying in regard to Exemption 5 that "the Act [does not], by its terms, permit inquiry into particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant." *Id.*, at 86. It is significant that although one of the most controversial features of the 1974 amendments to the FOIA was the revision of § 552(b)(1) to overturn the holding of *Mink* regarding Exemption 1, see President's Message to the House of Representatives Returning H. R. 12471 Without His Approval, 10 Weekly Comp. of Pres. Doc. 1318 (1974), Exemption 5 was left unchanged. We strongly reaffirmed our *Mink* approach in *NLRB* v. *Sears, Roebuck & Co.*:

> "Sears' rights under the Act are neither increased nor decreased by reason of the fact that it claims an interest

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. . . made available to the Bureau of Prisons or the Parole Commission"); 18 U. S. C. § 4205(e) (making it "the duty of the various probation officers" to provide the reports of prisoners eligible for parole to the Parole Commission upon request).

> in the Advice and Appeals Memoranda greater than that shared by the average member of the public. The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants." 421 U. S., at 143, n. 10.
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> "[I]t is not sensible to construe the Act to require disclosure of any document which would be disclosed in the hypothetical litigation in which the private party's claim is the most compelling. Indeed, the House Report says that Exemption 5 was intended to permit disclosure of those intra-agency memoranda which would 'routinely be disclosed' in private litigation, H. R. Rep. No. 1497, p. 10, and we accept this as the law. [Citing *Sterling Drug*, *supra*.]" *Id.*, at 149, n. 16.

Again in 1983, we confirmed the basic principle underlying all this, that if an Exemption 5 privilege cannot be asserted against one particular requester, it cannot be asserted against the world:

> "The logical result of respondent's position is that whenever work-product documents would be discoverable in any particular litigation, they must be disclosed to anyone under the FOIA. We have previously rejected that line of analysis." *FTC* v. *Grolier Inc.*, 462 U. S. 19, 28.

Most recently, in 1984, we again disregarded the identity and circumstances of the FOIA requester for purposes of making the Exemption 5 determination, expressing the basis for our decision quite simply: "[S]ince the *Machin* privilege [protecting confidential statements made to government air crash safety investigators] is well recognized in the case law as precluding routine disclosure of the statements, the statements are covered by Exemption 5." *United States* v. *Weber Aircraft Corp.*, 465 U. S. 792, 799.[2]

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[2] The privilege protecting presentence reports is unquestionably "well recognized in the case law as precluding routine disclosure." See, *e. g.*, *United States* v. *Charmer Industries, Inc.*, 711 F. 2d 1164, 1175–1176

In sum, the clear state of the law before today's decision has been that "the scope of Exemption 5 is to be determined without regard to the particular circumstances or needs of any specific actual or hypothetical party." *Brockway* v. *Department of Air Force*, 518 F. 2d 1184, 1192, n. 7 (CA8 1975). Or as one of the current FOIA looseleaf services categorically states: "[N]o requester is entitled to greater rights of access under Exemption 5 by virtue of whatever special interests might influence the outcome of actual civil discovery to which he is a party." J. Franklin & R. Bouchard, Guidebook to the Freedom of Information and Privacy Acts, § 1.08[2], p. 1–72 (2d ed., 1987). Thus, it is simply inaccurate for the Court to say that "the reasoning of the cases denying disclosure to third-party requesters would have little applicability to a request by a defendant to examine his own report . . . ." *Ante*, at 13. The reasoning of the cases, like the reasoning of the scholars and the language of the statute, recognizes no such thing as a "third-party requester," since it affirms that *all* FOIA requesters have equivalent status, and equivalent right to the *public documents* that the FOIA identifies. Nor is the Court's error corrected by the qualifier that it adds, "particularly in light of Rule 32(c)'s specific mandate that the report be disclosed to the defendant during sentencing." *Ibid.* That "mandate" (which in any event, as I have discussed, does not require provision of a retention-copy of the document) cannot be applied without impermissibly adverting to the individuating characteristics of the requester.

The Court's error is further demonstrated by the provisions of the Privacy Act of 1974, 5 U. S. C. § 552a—which, unlike the FOIA, *is* intended to provide to a particular individual documents that would not be available to the public at large, namely, documents containing "information about

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(CA2 1983); *United States* v. *Martinello*, 556 F. 2d 1215, 1216 (CA5 1977); *United States* v. *Figurski*, 545 F. 2d 389, 391 (CA4 1976); *United States* v. *Greathouse*, 484 F. 2d 805, 807 (CA7 1973); *United States* v. *Evans*, 454 F. 2d 813, 819–820 (CA8), cert. denied, 406 U. S. 969 (1972).

[that] individual." § 552a(a)(4). Why, one might wonder, did not the present respondents seek the requested report under the provisions of that legislation? The answer is § 552a(j)(2)(C), which specifically permits agencies, by regulation, to exclude from available records "reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision."[3] This provision, when combined with the limitations contained in Rule 32 and the 1976 Parole Act, makes it entirely clear that Congress did not mean the FOIA to give these respondents any greater right than the general public to copies of their presentence investigation reports.

Since, as I have confessed earlier, it is not clear to me why providing a copy of the report is so much worse than providing inspection, it may perhaps be that the dire consequences predicted by those who persuaded Congress to adopt the limitations that we today repeal will not ensue. I have no doubt, however, that today's decision will be a bombshell in the area of FOIA law. Contrary to settled precedent, the Court has adopted the principle that the individuating characteristics of the requester may be taken into account for purposes of one of the most important and frequently invoked exemptions, Exemption 5. To be sure, only a particular individuating characteristic, which the Court takes pains to narrow, is the subject of the present suit. But once we have adopted the principle, we have condemned the lower courts (and, I suppose, ourselves) to an appreciable increase in the volume of FOIA litigation, as one requester after another tests whether some statute, some principle of law, some court rule, justifies taking *his* particular characteristics into account. I respectfully dissent from this unfortunate holding.

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[3] The Parole Commission has invoked this available exemption. See 28 CFR § 16.85(a)(2) (1987). With respect to presentence reports in particular, the regulations provide that requests "must be directed to the appropriate court." § 2.56(b). It is this regulation, rather than the Court's holding today, which genuinely implements the intent of Rule 32(c)—that copies of the report can be retained only with the permission of the sentencing court.

D. H. HOLMES CO., LTD. *v.* McNAMARA, SECRETARY OF REVENUE AND TAXATION OF LOUISIANA

APPEAL FROM THE COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT

No. 87-267. Argued March 22, 1988—Decided May 16, 1988

Appellant, a Louisiana corporation which operates 13 department stores realizing over $100 million in annual sales in that State, contracted with several out-of-state companies to design, print, and distribute merchandise catalogs. Appellant paid for the catalogs, which were shipped free of charge to addressees; supplied the contractors with lists of addressees, 82% of whom were Louisiana residents; instructed postal authorities to return undeliverable catalogs to its New Orleans store; and initiated the distribution to improve its sales and name recognition among Louisiana residents. Appellant did not pay any sales taxes where the catalogs were designed or printed. The Louisiana Department of Revenue and Taxation, of which appellee is Secretary, assessed taxes on the catalogs' value under a statute imposing a 3% use tax on all tangible personal property used in Louisiana and defining "use" as the exercise of any right or power over such property incident to ownership, including distribution. When appellant refused to pay the tax, the State filed and won a collection suit in state court. The Louisiana Court of Appeal affirmed, finding that once the catalogs landed in Louisiana mailboxes they left the stream of interstate commerce and became part of the property mass of the State; that distribution of the catalogs constituted "use" subject to taxation under the statute; and that, under the four-pronged test for determining the validity of state taxes articulated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, the use tax did not violate the Commerce Clause of the Federal Constitution.

Held: The application of Louisiana's use tax to appellant's catalogs does not violate the Commerce Clause. It is largely irrelevant for Clause purposes whether the catalogs "came to rest" in the Louisiana customers' mailboxes or whether they were still considered in the stream of interstate commerce, since *Complete Auto* recognized that, with certain restrictions, interstate commerce may be required to pay its fair share of state taxes. Moreover, the argument that the assessment against the catalogs was in essence a tax on the mere presence of goods within the State is without merit, since *distribution* constitutes use under the statute. Furthermore, the application of the tax to the catalogs satisfies each prong of the *Complete Auto* test. The taxing scheme is fairly apportioned, since it provides a credit against the use tax for sales taxes paid in other States, and since the use tax was imposed only on those catalogs distributed in-state, and not on those sent to out-of-state customers. The tax structure likewise does not discriminate against interstate commerce, since the use tax, which is designed to compensate the State for revenue lost on out-of-state purchases of goods used in-state, is equal to the sales tax on the same goods purchased in-state; in fact, both taxes are set forth in the same statutory sections. The use tax is also fairly related to state-provided services that facilitate appellant's in-state sales, including fire and police protection for appellant's stores and mass transit and public roads which benefit appellant's customers. Finally, appellant's activity had a substantial nexus with Louisiana, since appellant controlled the distribution of the catalogs to approximately 400,000 state residents, the distribution was directly aimed at expanding and enhancing its Louisiana business, and it has a significant presence in the State in terms of number of stores and annual sales volume. Cf. *National Geographic Society* v. *California Bd. of Equalization*, 430 U. S. 551. *National Bellas Hess, Inc.* v. *Department of Revenue of Illinois*, 386 U. S. 753, distinguished. Pp. 29–34.

505 So. 2d 102, affirmed.

REHNQUIST, C. J., delivered the opinion for a unanimous Court.

Andrew Rinker, Jr., argued the cause for appellant. With him on the briefs were *William F. Grace, Jr.*, and *Kenneth J. Servay*.

Robert G. Pugh argued the cause for appellee. With him on the brief was *Robert G. Pugh, Jr.**

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*Briefs of *amici curiae* urging reversal were filed for the American Retail Federation by *Maryann B. Gall;* for the Committee on State Taxation of the Council of State Chambers of Commerce by *Jean A. Walker* and *Paul H. Frankel;* for the National Association of Catalog Showroom Merchandisers by *Richard B. Kelly* and *Thomas P. Mohen;* and for R. R. Donnelley & Sons Co. et al. by *Rex E. Lee, Michael A. Nemeroff, Carter G. Phillips*, and *Mark D. Hopson.*

Briefs of *amici curiae* urging affirmance were filed for the Multistate Tax Commission by *Alan H. Friedman;* and for the National Governors' Association et al. by *Benna Ruth Solomon* and *Gregory Evers May.*

George S. Isaacson, Martin I. Eisenstein, and *Robert J. Levering* filed a brief for the Direct Marketing Association as *amicus curiae.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Appellant, a Louisiana corporation, challenges the State's imposition of a use tax on catalogs printed at appellant's direction outside Louisiana and shipped to prospective customers within the State. The Louisiana Court of Appeal found that this application of the use tax did not violate the Commerce Clause of the Federal Constitution. We affirm.

I

Appellant D. H. Holmes Company, Ltd., is a Louisiana corporation with its principal place of business and registered office in New Orleans. Holmes owns and operates 13 department stores in various locations throughout Louisiana that employ about 5,000 workers. It has approximately 500,000 credit card customers and an estimated 1,000,000 other customers within the State.

In 1979–1981, Holmes contracted with several New York companies for the design and printing of merchandise catalogs. The catalogs were designed in New York, but were actually printed in Atlanta, Boston, and Oklahoma City. From these locations, 82% of the catalogs were directly mailed to residents of Louisiana; the remainder of the catalogs were mailed to customers in Alabama, Mississippi, and Florida, or were sent to Holmes for distribution at its flagship store on Canal Street in New Orleans. The catalogs were shipped free of charge to the addressee, and their entire cost (about $2 million for the 3-year period), including mailing, was borne by Holmes. Holmes did not, however, pay any sales tax where the catalogs were designed or printed.

Although the merchandise catalogs were mailed to selected customers, they contained instructions to the postal carrier to leave them with the current resident if the addressee had moved, and to return undeliverable catalogs to Holmes' Canal Street store. Holmes freely concedes that the purpose of the catalogs was to promote sales at its stores and to instill name recognition in future buyers. The catalogs included inserts which could be used to order Holmes' products by mail.

The Louisiana Department of Revenue and Taxation, of which appellee is the current Secretary, conducted an audit of Holmes' tax returns for 1979–1981 and determined that it was liable for delinquent use taxes on the value of the catalogs. The Department of Revenue and Taxation assessed the use tax pursuant to La. Rev. Stat. Ann. §§47:302 and 47:321 (West 1970 and Supp. 1988), which are set forth in the margin.[1] Together, §§47:302(A)(2) and 47:321(A)(2) impose a use tax of 3% on all tangible personal property used in Louisiana. "Use," as defined elsewhere in the statute, is the exercise of any right or power over tangible personal property incident to ownership, and includes consumption, distribution, and storage. See La. Rev. Stat. Ann. §§47:301(18) and (19) (West 1970 and Supp. 1988). The use tax is designed to compensate the State for sales tax that is lost when goods are purchased out-of-state and brought for use into Louisiana, and is calculated on the retail price the property would have brought when imported.

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[1] "§47:302. Imposition of tax

"A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:

. . . . .

"(2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax."

"§47:321. Imposition of tax

"A. In addition to the tax levied by R. S. 47:302(A) and collected under the provisions of Chapter 2 of Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950, there is hereby levied an additional tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property . . . the levy of said tax to be as follows:

. . . . .

"(2) At the rate of one percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state, provided that there shall be no duplication of the tax."

When Holmes refused to pay the use tax assessed against it, the State filed suit in Louisiana Civil District Court to collect the tax.[2] In response to the State's complaint, Holmes answered that it owed no tax under §§47:302 and 47:321 as properly applied, a position Holmes claimed was reinforced by La. Rev. Stat. Ann. §47:305(5) (West 1970).[3] Holmes also contended that the use tax violated the Commerce Clause of the Federal Constitution.

After a 2-day bench trial, the District Court determined that the distribution of the catalogs in Louisiana was "intended for the use of D. H. Holmes in increasing its sales to potential customers who are residents of Louisiana." No. 83-15523 (La. Civ. Dist. Ct., July 19, 1985), App. to Juris. Statement 12A, 21A. The court also found that "[o]nce the catalogs reach the residences of the prospective customers to whom they are addressed, Louisiana taxing authority reaches the resting place of the catalogs," *id.*, at 22A, and concluded that the application of the use tax statutes did not unconstitutionally burden interstate commerce. The court then ordered Holmes to pay the State $49,937.03, plus interest and attorney's fees, which was the amount the parties stipulated as due on the use tax.

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[2] As originally filed in Louisiana Civil District Court, the State's complaint included a claim for delinquent sales taxes on candy sold by Holmes. The State apparently reached an acceptable compromise with Holmes, and the Civil District Court granted a joint motion by the parties to dismiss without prejudice the candy sales tax issue. That issue is thus no longer a part of this case.

[3] As then codified this section provided:

"§47:305. Exclusions and exemptions from the tax

. . . . .

"(5) It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce. It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state."

The Louisiana Court of Appeal, Fourth Circuit, affirmed the judgment of the trial court. 505 So. 2d 102 (1987). After reviewing the Louisiana use tax statute, the Court of Appeal found that the catalog distribution was properly subjected to the tax, since once the catalogs landed in Louisiana mailboxes they left the stream of interstate commerce and became part of the property mass of the State. Furthermore, "[d]istribution of the catalogs certainly constitutes 'use' by Holmes under the statute and is subject to the tax." *Id.*, at 105. Turning to the federal question in the case, the Court of Appeal analyzed the use tax under the test we articulated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977), and found that it did not violate the Commerce Clause.

The Louisiana Supreme Court denied discretionary review. 506 So. 2d 1224 (1987). We noted probable jurisdiction, pursuant to 28 U. S. C. § 1257(2). 484 U. S. 923 (1987).

II

The Commerce Clause of the Constitution, Art. I, § 8, cl. 3, provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Even where Congress has not acted affirmatively to protect interstate commerce, the Clause prevents States from discriminating against that commerce. The "distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law." *H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 525, 533 (1949).

One frequent source of conflict of this kind occurs when a State seeks to tax the sale or use of goods within its borders. See, *e. g., Colonial Pipeline Co.* v. *Traigle*, 421 U. S. 100 (1975); *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80 (1948). This recurring dilemma is exemplified in what has come to be the leading case in the area, *Complete Auto Transit, Inc.* v. *Brady*, *supra.* In *Complete Auto*, Mississippi imposed a tax on appellant's business of in-state transportation of motor vehicles manufactured outside the State. We found that the State's tax did not violate the Commerce Clause, because appellant's activity had a substantial nexus with Mississippi, and the tax was fairly apportioned, did not discriminate against interstate commerce, and was fairly related to benefits provided by the State. *Id.*, at 287.

This four-part formulation has since been used to evaluate the validity of state taxes vis-à-vis the Commerce Clause in a number of contexts. Two Terms ago, for instance, we upheld a Florida tax on aviation fuel purchased within the State, finding that all four of the *Complete Auto* criteria were satisfied. *Wardair Canada Inc.* v. *Florida Dept. of Revenue*, 477 U. S. 1 (1986). The *Complete Auto* test has also been employed to test the constitutionality of business and occupation taxes, *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U. S. 734 (1978); mineral severance taxes, *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609 (1981); and the taxation of income received by an out-of-state corporation from its in-state subsidiaries, *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S. 425 (1980).

Complete Auto abandoned the abstract notion that interstate commerce "itself" cannot be taxed by the States. We recognized that, with certain restrictions, interstate commerce may be required to pay its fair share of state taxes. Accordingly, in the present case, it really makes little difference for Commerce Clause purposes whether Holmes' catalogs "came to rest" in the mailboxes of its Louisiana customers or whether they were still considered in the stream of interstate commerce. This distinction may be of some importance for other purposes (in determining, for instance, whether a "taxable moment" has occurred, see 505 So. 2d, at 105), but for Commerce Clause analysis it is largely irrelevant.

Holmes argues that Louisiana's assessment against its merchandise catalogs is, in essence, a tax on the mere presence of goods within the State. This contention was expressly rejected by the Louisiana Court of Appeal's finding that the *distribution* of the catalogs constituted use under §§47:302 and 47:321. We accept this construction of state law, and thus see no merit in the argument that Louisiana has attempted to tax only the existence of goods within the State.

In the case before us, then, the application of Louisiana's use tax to Holmes' catalogs does not violate the Commerce Clause if the tax complies with the four prongs of *Complete Auto*. We have no doubt that the second and third elements of the test are satisfied. The Louisiana taxing scheme is fairly apportioned, for it provides a credit against its use tax for sales taxes that have been paid in other States. See La. Rev. Stat. Ann. §47:303(A) (West 1970) ("A credit against the use tax imposed by this Chapter shall be granted to taxpayers who have paid a similar tax upon the sale or use of the same tangible personal property in another state"); §47:302(A)(2) (instructing that "there shall be no duplication of the tax"); §47:321(A)(2) (West Supp. 1988) (same). Holmes paid no sales tax for the catalogs where they were designed or printed; if it had, it would have been eligible for a credit against the use tax exacted. Similarly, Louisiana imposed its use tax only on the 82% of the catalogs distributed in-state; it did not attempt to tax that portion of the catalogs that went to out-of-state customers.

The Louisiana tax structure likewise does not discriminate against interstate commerce. The use tax is designed to compensate the State for revenue lost when residents purchase out-of-state goods for use within the State. It is equal to the sales tax applicable to the same tangible personal property purchased in-state; in fact, both taxes are set forth in the same sections of the Louisiana statutes. See La. Rev. Stat. Ann. §§ 47:302 and 47:321 (West 1970 and Supp. 1988).

Complete Auto requires that the tax be fairly related to benefits provided by the State, but that condition is also met here. Louisiana provides a number of services that facilitate Holmes' sale of merchandise within the State: It provides fire and police protection for Holmes' stores, runs mass transit and maintains public roads which benefit Holmes' customers, and supplies a number of other civic services from which Holmes profits. To be sure, many others in the State benefit from the same services; but that does not alter the fact that the use tax paid by Holmes, on catalogs designed to increase sales, is related to the advantages provided by the State which aid Holmes' business.

Finally, we believe that Holmes' distribution of its catalogs reflects a substantial nexus with Louisiana. To begin with, Holmes' contention that it lacked sufficient control over the catalogs' distribution in Louisiana to be subject to the use tax verges on the nonsensical. Holmes ordered and paid for the catalogs and supplied the list of customers to whom the catalogs were sent; any catalogs that could not be delivered were returned to it. Holmes admits that it initiated the distribution to improve its sales and name recognition among Louisiana residents. Holmes also has a significant presence in Louisiana, with 13 stores and over $100 million in annual sales in the State. See App. 68–69, 98. The distribution of catalogs to approximately 400,000 Louisiana customers was directly aimed at expanding and enhancing its Louisiana business. There is "nexus" aplenty here.

Holmes and several *amici* argue that Holmes' posture here closely resembles the predicament of the mail-order business we confronted in *National Bellas Hess, Inc.* v. *Department of Revenue of Illinois,* 386 U. S. 753 (1967). In *National Bellas Hess,* we held that the State of Illinois could not, consistently with the Commerce Clause, compel an out-of-state mail-order company to collect a use tax on purchases of goods by Illinois residents when the seller's only connection with its Illinois customers was by mail or common carrier. Holmes apparently views its catalog distribution as analogous to the mail-order solicitation in *National Bellas Hess.* This argument ignores, however, Holmes' significant economic presence in Louisiana, its many connections with the State, and the direct benefits it receives from Louisiana in conducting its business. We thus see little similarity between the mail-order shipments in *National Bellas Hess* and Holmes' activities in this case.

We find Holmes' activities much closer to those considered in *National Geographic Society* v. *California Board of Equalization,* 430 U. S. 551 (1977). *National Geographic* involved the operation of two California offices by a national magazine devoted solely to soliciting advertising for the magazine. California nonetheless applied its use tax, which required every retailer engaged in business in the State to collect a tax from its purchasers, on the magazine's mail-order activities. We determined that the imposition of the tax did not violate the Commerce Clause, since the magazine's "maintenance of the two offices in California and activities there adequately establish[ed] a relationship or 'nexus' between the [magazine] and the State" sufficient to support the tax. *Id.,* at 556. This conclusion applies *a fortiori* here, since Holmes' connection with Louisiana far exceeds that of the magazine with California in *National Geographic*.

Because Louisiana's imposition of its use tax on Holmes does not violate the Commerce Clause, the judgment of the Louisiana Court of Appeal is

Affirmed.

CALIFORNIA *v.* GREENWOOD ET AL.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

No. 86–684. Argued January 11, 1988—Decided May 16, 1988

Acting on information indicating that respondent Greenwood might be engaged in narcotics trafficking, police twice obtained from his regular trash collector garbage bags left on the curb in front of his house. On the basis of items in the bags which were indicative of narcotics use, the police obtained warrants to search the house, discovered controlled substances during the searches, and arrested respondents on felony narcotics charges. Finding that probable cause to search the house would not have existed without the evidence obtained from the trash searches, the State Superior Court dismissed the charges under *People* v. *Krivda*, 5 Cal. 3d 357, 486 P. 2d 1262, which held that warrantless trash searches violate the Fourth Amendment and the California Constitution. Although noting a post-*Krivda* state constitutional amendment eliminating the exclusionary rule for evidence seized in violation of state, but not federal, law, the State Court of Appeal affirmed on the ground that *Krivda* was based on federal, as well as state, law.

Held:

1. The Fourth Amendment does not prohibit the warrantless search and seizure of garbage left for collection outside the curtilage of a home. Pp. 39–44.

(a) Since respondents voluntarily left their trash for collection in an area particularly suited for public inspection, their claimed expectation of privacy in the inculpatory items they discarded was not objectively reasonable. It is common knowledge that plastic garbage bags left along a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through it or permitted others, such as the police, to do so. The police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public. Pp. 39–43.

(b) Greenwood's alternative argument that his expectation of privacy in his garbage should be deemed reasonable as a matter of federal constitutional law because the warrantless search and seizure of his garbage was impermissible as a matter of California law under *Krivda*, which he contends survived the state constitutional amendment, is without merit. The reasonableness of a search for Fourth Amendment purposes does not depend upon privacy concepts embodied in the law of the particular State in which the search occurred; rather, it turns upon the understanding of society as a whole that certain areas deserve the most scrupulous protection from government invasion. There is no such understanding with respect to garbage left for collection at the side of a public street. Pp. 43–44.

2. Also without merit is Greenwood's contention that the California constitutional amendment violates the Due Process Clause of the Fourteenth Amendment. Just as this Court's Fourth Amendment exclusionary rule decisions have not required suppression where the benefits of deterring minor police misconduct were overbalanced by the societal costs of exclusion, California was not foreclosed by the Due Process Clause from concluding that the benefits of excluding relevant evidence of criminal activity do not outweigh the costs when the police conduct at issue does not violate federal law. Pp. 44–45.

182 Cal. App. 3d 729, 227 Cal. Rptr. 539, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 45. KENNEDY, J., took no part in the consideration or decision of the case.

Michael J. Pear argued the cause for petitioner. With him on the briefs were *Cecil Hicks* and *Michael R. Capizzi.*

Michael Ian Garey, by appointment of the Court, 484 U. S. 808, argued the cause for respondents and filed a brief for respondent Greenwood. *Richard L. Schwartzberg* filed a brief for respondent Van Houten.*

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Steve White*, Chief Assistant Attorney General, *John H. Sugiyama*, Senior Assistant Attorney General, *Ronald E. Niver* and *Laurence K. Sullivan*, Supervising Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Robert Butterworth* of Florida, *Warren Price III* of Hawaii, *Linley E. Pearson* of Indiana, *David L. Armstrong* of Kentucky, *Hubert H. Humphrey III* of Minnesota, *LeRoy S. Zimmerman* of Pennsylvania, *Travis Medlock* of South Carolina, *W. J. Michael Cody* of Tennessee, *Kenneth O. Eikenberry* of Washington, *Donald J. Hanaway* of Wisconsin, and *Joseph B. Meyer* of Wyoming; and for Americans for Effec-

JUSTICE WHITE delivered the opinion of the Court.

The issue here is whether the Fourth Amendment prohibits the warrantless search and seizure of garbage left for collection outside the curtilage of a home. We conclude, in accordance with the vast majority of lower courts that have addressed the issue, that it does not.

I

In early 1984, Investigator Jenny Stracner of the Laguna Beach Police Department received information indicating that respondent Greenwood might be engaged in narcotics trafficking. Stracner learned that a criminal suspect had informed a federal drug enforcement agent in February 1984 that a truck filled with illegal drugs was en route to the Laguna Beach address at which Greenwood resided. In addition, a neighbor complained of heavy vehicular traffic late at night in front of Greenwood's single-family home. The neighbor reported that the vehicles remained at Greenwood's house for only a few minutes.

Stracner sought to investigate this information by conducting a surveillance of Greenwood's home. She observed several vehicles make brief stops at the house during the late-night and early morning hours, and she followed a truck from the house to a residence that had previously been under investigation as a narcotics-trafficking location.

On April 6, 1984, Stracner asked the neighborhood's regular trash collector to pick up the plastic garbage bags that Greenwood had left on the curb in front of his house and to turn the bags over to her without mixing their contents with garbage from other houses. The trash collector cleaned his truck bin of other refuse, collected the garbage bags from the street in front of Greenwood's house, and turned the bags over to Stracner. The officer searched through the rubbish

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tive Law Enforcement, Inc., et al. by *Fred E. Inbau, Wayne W. Schmidt, James P. Manak, David Crump, Courtney A. Evans, Daniel B. Hales,* and *Jack E. Yelverton.*

and found items indicative of narcotics use. She recited the information that she had gleaned from the trash search in an affidavit in support of a warrant to search Greenwood's home.

Police officers encountered both respondents at the house later that day when they arrived to execute the warrant. The police discovered quantities of cocaine and hashish during their search of the house. Respondents were arrested on felony narcotics charges. They subsequently posted bail.

The police continued to receive reports of many late-night visitors to the Greenwood house. On May 4, Investigator Robert Rahaeuser obtained Greenwood's garbage from the regular trash collector in the same manner as had Stracner. The garbage again contained evidence of narcotics use.

Rahaeuser secured another search warrant for Greenwood's home based on the information from the second trash search. The police found more narcotics and evidence of narcotics trafficking when they executed the warrant. Greenwood was again arrested.

The Superior Court dismissed the charges against respondents on the authority of *People* v. *Krivda*, 5 Cal. 3d 357, 486 P. 2d 1262 (1971), which held that warrantless trash searches violate the Fourth Amendment and the California Constitution. The court found that the police would not have had probable cause to search the Greenwood home without the evidence obtained from the trash searches.

The Court of Appeal affirmed. 182 Cal. App. 3d 729, 227 Cal. Rptr. 539 (1986). The court noted at the outset that the fruits of warrantless trash searches could no longer be suppressed if *Krivda* were based only on the California Constitution, because since 1982 the State has barred the suppression of evidence seized in violation of California law but not federal law. See Cal. Const., Art. I, § 28(d); *In re Lance W.*, 37 Cal. 3d 873, 694 P. 2d 744 (1985). But *Krivda*, a decision binding on the Court of Appeal, also held that the fruits of warrantless trash searches were to be excluded under federal law. Hence, the Superior Court was correct in dismissing the charges against respondents. 182 Cal. App. 3d, at 735, 227 Cal. Rptr, at 542.[1]

The California Supreme Court denied the State's petition for review of the Court of Appeal's decision. We granted certiorari, 483 U. S. 1019, and now reverse.

II

The warrantless search and seizure of the garbage bags left at the curb outside the Greenwood house would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable. *O'Connor* v. *Ortega*, 480 U. S. 709, 715 (1987); *California* v. *Ciraolo*, 476 U. S. 207, 211 (1986); *Oliver* v. *United States*, 466 U. S. 170, 177 (1984); *Katz* v. *United States*, 389 U. S. 347, 361 (1967) (Harlan, J., concurring). Respondents do not disagree with this standard.

They assert, however, that they had, and exhibited, an expectation of privacy with respect to the trash that was searched by the police: The trash, which was placed on the street for collection at a fixed time, was contained in opaque plastic bags, which the garbage collector was expected to pick up, mingle with the trash of others, and deposit at the garbage dump. The trash was only temporarily on the street, and there was little likelihood that it would be inspected by anyone.

It may well be that respondents did not expect that the contents of their garbage bags would become known to the police or other members of the public. An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable.

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[1] The Court of Appeal also held that respondent Van Houten had standing to seek the suppression of evidence discovered during the April 4 search of Greenwood's home. 182 Cal. App. 3d, at 735, 227 Cal. Rptr., at 542–543.

Here, we conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals,[2] children, scavengers,[3] snoops,[4] and other members of the public. See *Krivda, supra,* at 367, 486 P. 2d, at 1269. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage "in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it," *United States* v. *Reicherter*, 647 F. 2d 397, 399 (CA3 1981), respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.

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[2] For example, *State* v. *Ronngren,* 361 N. W. 2d 224 (N. D. 1985), involved the search of a garbage bag that a dog, acting "at the behest of no one," *id.*, at 228, had dragged from the defendants' yard into the yard of a neighbor. The neighbor deposited the bag in his own trash can, which he later permitted the police to search. The North Dakota Supreme Court held that the search of the garbage bag did not violate the defendants' Fourth Amendment rights.

[3] It is not only the homeless of the Nation's cities who make use of others' refuse. For example, a nationally syndicated consumer columnist has suggested that apartment dwellers obtain cents-off coupons by "mak[ing] friends with the fellow who handles the trash" in their buildings, and has recounted the tale of "the 'Rich lady' from Westmont who once a week puts on rubber gloves and hip boots and wades into the town garbage dump looking for labels and other proofs of purchase" needed to obtain manufacturers' refunds. M. Sloane, "The Supermarket Shopper's" 1980 Guide to Coupons and Refunds 74, 161 (1980).

[4] Even the refuse of prominent Americans has not been invulnerable. In 1975, for example, a reporter for a weekly tabloid seized five bags of garbage from the sidewalk outside the home of Secretary of State Henry Kissinger. Washington Post, July 9, 1975, p. A1, col. 8. A newspaper editorial criticizing this journalistic "trash-picking" observed that "[e]vidently . . . 'everybody does it.'" Washington Post, July 10, 1975, p. A18, col. 1. We of course do not, as the dissent implies, "bas[e] [our] conclusion" that individuals have no reasonable expectation of privacy in their garbage on this "sole incident." *Post,* at 51.

Furthermore, as we have held, the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public. Hence, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States*, *supra*, at 351. We held in *Smith* v. *Maryland*, 442 U. S. 735 (1979), for example, that the police did not violate the Fourth Amendment by causing a pen register to be installed at the telephone company's offices to record the telephone numbers dialed by a criminal suspect. An individual has no legitimate expectation of privacy in the numbers dialed on his telephone, we reasoned, because he voluntarily conveys those numbers to the telephone company when he uses the telephone. Again, we observed that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Id.*, at 743–744.

Similarly, we held in *California* v. *Ciraolo*, *supra*, that the police were not required by the Fourth Amendment to obtain a warrant before conducting surveillance of the respondent's fenced backyard from a private plane flying at an altitude of 1,000 feet. We concluded that the respondent's expectation that his yard was protected from such surveillance was unreasonable because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed." *Id.*, at 213–214.

Our conclusion that society would not accept as reasonable respondents' claim to an expectation of privacy in trash left for collection in an area accessible to the public is reinforced by the unanimous rejection of similar claims by the Federal Courts of Appeals. See *United States* v. *Dela Espriella*,

781 F. 2d 1432, 1437 (CA9 1986); *United States* v. *O'Bryant*, 775 F. 2d 1528, 1533–1534 (CA11 1985); *United States* v. *Michaels*, 726 F. 2d 1307, 1312–1313 (CA8), cert. denied, 469 U. S. 820 (1984); *United States* v. *Kramer*, 711 F. 2d 789, 791–794 (CA7), cert. denied, 464 U. S. 962 (1983); *United States* v. *Terry*, 702 F. 2d 299, 308–309 (CA2), cert. denied *sub nom. Williams* v. *United States*, 461 U. S. 931 (1983); *United States* v. *Reicherter*, *supra*, at 399; *United States* v. *Vahalik*, 606 F. 2d 99, 100–101 (CA5 1979) *(per curiam)*, cert. denied, 444 U. S. 1081 (1980); *United States* v. *Crowell*, 586 F. 2d 1020, 1025 (CA4 1978), cert. denied, 440 U. S. 959 (1979); *Magda* v. *Benson*, 536 F. 2d 111, 112–113 (CA6 1976) *(per curiam)*; *United States* v. *Mustone*, 469 F. 2d 970, 972–974 (CA1 1972). In *United States* v. *Thornton*, 241 U. S. App. D. C. 46, 56, and n. 11, 746 F. 2d 39, 49, and n. 11 (1984), the court observed that "the overwhelming weight of authority rejects the proposition that a reasonable expectation of privacy exists with respect to trash discarded outside the home and the curtilege *[sic]* thereof." In addition, of those state appellate courts that have considered the issue, the vast majority have held that the police may conduct warrantless searches and seizures of garbage discarded in public areas. See *Commonwealth* v. *Chappee*, 397 Mass. 508, 512–513, 492 N. E. 2d 719, 721–722 (1986); *Cooks* v. *State*, 699 P. 2d 653, 656 (Okla. Crim.), cert. denied, 474 U. S. 935 (1985); *State* v. *Stevens*, 123 Wis. 2d 303, 314–317, 367 N. W. 2d 788, 794–797, cert. denied, 474 U. S. 852 (1985); *State* v. *Ronngren*, 361 N. W. 2d 224, 228–230 (N. D. 1985); *State* v. *Brown*, 20 Ohio App. 3d 36, 37–38, 484 N. E. 2d 215, 217–218 (1984); *State* v. *Oquist*, 327 N. W. 2d 587 (Minn. 1982); *People* v. *Whotte*, 113 Mich. App. 12, 317 N. W. 2d 266 (1982); *Commonwealth* v. *Minton*, 288 Pa. Super. 381, 391, 432 A. 2d 212, 217 (1981); *State* v. *Schultz*, 388 So. 2d 1326 (Fla. App. 1980); *People* v. *Huddleston*, 38 Ill. App. 3d 277, 347 N. E. 2d 76 (1976); *Willis* v. *State*, 518 S. W. 2d 247, 249 (Tex. Crim. App. 1975); *Smith* v. *State*, 510 P. 2d 793 (Alaska), cert. denied,

414 U. S. 1086 (1973); *State* v. *Fassler*, 108 Ariz. 586, 592–593, 503 P. 2d 807, 813–814 (1972); *Croker* v. *State*, 477 P. 2d 122, 125–126 (Wyo. 1970); *State* v. *Purvis*, 249 Ore. 404, 411, 438 P. 2d 1002, 1005 (1968). But see *State* v. *Tanaka*, 67 Haw. 658, 701 P. 2d 1274 (1985); *People* v. *Krivda*, 5 Cal. 3d 357, 486 P. 2d 1262 (1971).[5]

III

We reject respondent Greenwood's alternative argument for affirmance: that his expectation of privacy in his garbage should be deemed reasonable as a matter of federal constitutional law because the warrantless search and seizure of his garbage was impermissible as a matter of California law. He urges that the state-law right of Californians to privacy in their garbage, announced by the California Supreme Court in *Krivda*, *supra*, survived the subsequent state constitutional amendment eliminating the suppression remedy as a means of enforcing that right. See *In re Lance W.*, 37 Cal. 3d, at 886–887, 694 P. 2d, at 752–753. Hence, he argues that the Fourth Amendment should itself vindicate that right.

Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution. We have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs. We have emphasized instead that the Fourth Amendment analysis must turn on such factors as "our *societal* understanding that certain areas deserve the most scrupulous protection from government invasion." *Oliver* v. *United States*, 466 U. S., at 178 (emphasis added). See also *Rakas* v. *Illinois*, 439 U. S. 128, 143–144, n. 12 (1978). We have already concluded that society as a whole possesses no such understanding with regard to garbage left for collection at the side of a public street. Respondent's argument is no less than a suggestion that concepts of privacy under the laws of each State are to determine the reach of the Fourth Amendment. We do not accept this submission.

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[5] Given that the dissenters are among the tiny minority of judges whose views are contrary to ours, we are distinctly unimpressed with the dissent's prediction that "society will be shocked to learn" of today's decision. *Post*, at 46.

IV

Greenwood finally urges as an additional ground for affirmance that the California constitutional amendment eliminating the exclusionary rule for evidence seized in violation of state but not federal law violates the Due Process Clause of the Fourteenth Amendment. In his view, having recognized a state-law right to be free from warrantless searches of garbage, California may not under the Due Process Clause deprive its citizens of what he describes as "the only effective deterrent" to violations of this right. Greenwood concedes that no direct support for his position can be found in the decisions of this Court. He relies instead on cases holding that individuals are entitled to certain procedural protections before they can be deprived of a liberty or property interest created by state law. See *Hewitt* v. *Helms*, 459 U. S. 460 (1983); *Vitek* v. *Jones*, 445 U. S. 480 (1980).

We see no merit in Greenwood's position. California could amend its Constitution to negate the holding in *Krivda* that state law forbids warrantless searches of trash. We are convinced that the State may likewise eliminate the exclusionary rule as a remedy for violations of that right. At the federal level, we have not required that evidence obtained in violation of the Fourth Amendment be suppressed in all circumstances. See, *e. g.*, *United States* v. *Leon*, 468 U. S. 897 (1984); *United States* v. *Janis*, 428 U. S. 433 (1976); *United States* v. *Calandra*, 414 U. S. 338 (1974). Rather, our decisions concerning the scope of the Fourth Amendment exclusionary rule have balanced the benefits of deterring police misconduct against the costs of excluding reliable evidence of criminal activity. See *Leon*, 468 U. S., at 908–913. We have declined to apply the exclusionary rule indiscriminately "when law enforcement officers have acted in objective good faith or their transgressions have been minor," because "the magnitude of the benefit conferred on . . . guilty defendants [in such circumstances] offends basic concepts of the criminal justice system." *Id.*, at 908 (citing *Stone* v. *Powell,* 428 U. S. 465, 490 (1976)).

The States are not foreclosed by the Due Process Clause from using a similar balancing approach to delineate the scope of their own exclusionary rules. Hence, the people of California could permissibly conclude that the benefits of excluding relevant evidence of criminal activity do not outweigh the costs when the police conduct at issue does not violate federal law.

V

The judgment of the California Court of Appeal is therefore reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Every week for two months, and at least once more a month later, the Laguna Beach police clawed through the trash that respondent Greenwood left in opaque, sealed bags on the curb outside his home. Record 113. Complete strangers minutely scrutinized their bounty, undoubtedly dredging up intimate details of Greenwood's private life and habits. The intrusions proceeded without a warrant, and no court before or since has concluded that the police acted on probable cause to believe Greenwood was engaged in any criminal activity.

Scrutiny of another's trash is contrary to commonly accepted notions of civilized behavior. I suspect, therefore, that members of our society will be shocked to learn that the Court, the ultimate guarantor of liberty, deems unreasonable our expectation that the aspects of our private lives that are concealed safely in a trash bag will not become public.

I

"A container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant." *United States* v. *Jacobsen*, 466 U. S. 109, 120, n. 17 (1984) (citations omitted). Thus, as the Court observes, if Greenwood had a reasonable expectation that the contents of the bags that he placed on the curb would remain private, the warrantless search of those bags violated the Fourth Amendment. *Ante*, at 39.

The Framers of the Fourth Amendment understood that "unreasonable searches" of "paper[s] and effects"—no less than "unreasonable searches" of "person[s] and houses"—infringe privacy. As early as 1878, this Court acknowledged that the contents of "[l]etters and sealed packages . . . in the mail are as fully guarded from examination and inspection . . . as if they were retained by the parties forwarding them in their own domiciles." *Ex parte Jackson*, 96 U. S. 727, 733. In short, so long as a package is "closed against inspection," the Fourth Amendment protects its contents, "wherever they may be," and the police must obtain a warrant to search it just "as is required when papers are subjected to search in one's own household." *Ibid.* Accord, *United States* v. *Van Leeuwen*, 397 U. S. 249 (1970).

With the emergence of the reasonable-expectation-of-privacy analysis, see *Katz* v. *United States*, 389 U. S. 347, 361 (1967) (Harlan, J., concurring); *Smith* v. *Maryland*, 442 U. S. 735, 740 (1979), we have reaffirmed this fundamental principle. In *Robbins* v. *California*, 453 U. S. 420 (1981), for example, Justice Stewart, writing for a plurality of four, pronounced that "unless the container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment," *id.*, at 427, and soundly rejected any distinction for Fourth Amendment purposes among various opaque, sealed containers:

> "[E]ven if one wished to import such a distinction into the Fourth Amendment, it is difficult if not impossible to perceive any objective criteria by which that task might be accomplished. What one person may put into a suitcase, another may put into a paper bag. . . . And . . . no court, no constable, no citizen, can sensibly be asked to distinguish the relative 'privacy interests' in a closed suitcase, briefcase, portfolio, duffelbag, or box." *Id.*, at 426–427.

See also *id.*, at 428 (expectation of privacy attaches to any container unless it "so clearly announce[s] its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer"). With only one exception, every Justice who wrote in that case eschewed any attempt to distinguish "worthy" from "unworthy" containers.[1]

More recently, in *United States* v. *Ross*, 456 U. S. 798 (1982), the Court, relying on the "virtually unanimous agreement in *Robbins* . . . that a constitutional distinction between 'worthy' and 'unworthy' containers would be improper," held that a distinction among "paper bags, locked trunks, lunch buckets, and orange crates" would be inconsistent with

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[1] See 453 U. S., at 436 (BLACKMUN, J., dissenting); *id.*, at 437 (REHNQUIST, J., dissenting); *id.*, at 444 (STEVENS, J., dissenting). But see *id.*, at 433–434 (Powell, J., concurring in judgment) (rejecting position that all containers, even "the most trivial," like "a cigarbox or a Dixie cup," are entitled to the same Fourth Amendment protection). Cf. *New York* v. *Belton*, 453 U. S. 454, 460–461, n. 4 (1981) (defining "container," for purposes of search incident to a lawful custodial arrest, as "any object capable of holding another object," including "luggage, boxes, bags, clothing, and the like").

In addition to finding that Robbins had a reasonable expectation of privacy in his duffelbag and plastic-wrapped packages, the Court also held that the automobile exception to the warrant requirement, see *Carroll* v. *United States*, 267 U. S. 132, 153 (1925), did not apply to packages found in an automobile. The Court overruled the latter determination in *United States* v. *Ross*, 456 U. S. 798 (1982), but reaffirmed that where, as here, the automobile exception is inapplicable, police may not conduct a warrantless search of any container that conceals its contents.

> "the central purpose of the Fourth Amendment. . . . [A] traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf [may] claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case.
>
> "As Justice Stewart stated in *Robbins*, the Fourth Amendment provides protection to the owner of *every container that conceals its contents from plain view*." *Id.*, at 822–823 (emphasis added; footnote and citation omitted).

See also *Jacobsen, supra*, at 129 (opinion of WHITE, J.).

Accordingly, we have found a reasonable expectation of privacy in the contents of a 200-pound "double-locked footlocker," *United States* v. *Chadwick*, 433 U. S. 1, 11 (1977); a "comparatively small, unlocked suitcase," *Arkansas* v. *Sanders*, 442 U. S. 753, 762, n. 9 (1979); a "totebag," *Robbins*, 453 U. S., at 422; and "packages wrapped in green opaque plastic," *ibid.* See also *Ross, supra*, at 801, 822–823 (suggesting that a warrant would have been required to search a "'lunch-type' brown paper bag" and a "zippered red leather pouch" had they not been found in an automobile); *Jacobsen, supra*, at 111, 114–115 (suggesting that a warrantless search of an "ordinary cardboard box wrapped in brown paper" would have violated the Fourth Amendment had a private party not already opened it).

Our precedent, therefore, leaves no room to doubt that had respondents been carrying their personal effects in opaque, sealed plastic bags—identical to the ones they placed on the curb—their privacy would have been protected from warrantless police intrusion. So far as Fourth Amendment protection is concerned, opaque plastic bags are every bit as worthy as "packages wrapped in green opaque plastic" and "double-locked footlocker[s]." Cf. *Robbins*, *supra*, at 441 (REHNQUIST, J., dissenting) (objecting to Court's discovery of reasonable expectation of privacy in contents of "two plastic garbage bags").

II

Respondents deserve no less protection just because Greenwood used the bags to discard rather than to transport his personal effects. Their contents are not inherently any less private, and Greenwood's decision to discard them, at least in the manner in which he did, does not diminish his expectation of privacy.[2]

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[2] Both to support its position that society recognizes no reasonable privacy interest in sealed, opaque trash bags and to refute the prediction that "society will be shocked to learn" of that conclusion, *supra*, at 46, the Court relies heavily upon a collection of lower court cases finding no Fourth Amendment bar to trash searches. But the authority that leads the Court to be "distinctly unimpressed" with our position, *ante*, at 43, n. 5, is itself impressively undistinguished. Of 11 Federal Court of Appeals cases cited by the Court, at least 2 are factually or legally distinguishable, see *United States* v. *O'Bryant*, 775 F. 2d 1528, 1533–1534 (CA11 1985) (police may search an apparently valuable briefcase "discarded next to an overflowing trash bin on a busy city street"); *United States* v. *Thornton*, 241 U. S. App. D. C. 46, 56, 746 F. 2d 39, 49 (1984) (reasonable federal agents could believe in good faith that a trash search is legal), and 7 rely entirely or almost entirely on an abandonment theory that, as noted *infra*, at 51, the Court has discredited, see *United States* v. *Dela Espriella*, 781 F. 2d 1432, 1437 (CA9 1986) ("The question, then, becomes whether placing garbage for collection constitutes abandonment of property"); *United States* v. *Terry*, 702 F. 2d 299, 308–309 (CA2) ("[T]he circumstances in this case clearly evidence abandonment by Williams of his trash"), cert. denied *sub nom. Williams* v. *United States*, 461 U. S. 931 (1983); *United States* v. *Reicherter*, 647 F. 2d 397, 399 (CA3 1981) ("[T]he placing of trash in garbage cans at a time and place for anticipated collection by public employees for hauling to a public dump signifies abandonment"); *United States* v. *Vahalik*, 606 F. 2d 99, 100–101 (CA5 1979) *(per curiam)* ("[T]he act of placing garbage for collection is an act of abandonment which terminates any fourth amendment protection"), cert. denied, 444 U. S. 1081 (1980); *United States* v. *Crowell*, 586 F. 2d 1020, 1025 (CA4 1978) ("The act of placing

A trash bag, like any of the above-mentioned containers, "is a common repository for one's personal effects" and, even more than many of them, is "therefore . . . inevitably associated with the expectation of privacy." *Sanders*, *supra*, at 762 (citing *Chadwick*, *supra*, at 13). "[A]lmost every human activity ultimately manifests itself in waste products . . . ." *Smith* v. *State*, 510 P. 2d 793, 798 (Alaska), cert. denied, 414 U. S. 1086 (1973). See *California* v. *Rooney*, 483 U. S. 307, 320–321, n. 3 (1987) (WHITE, J., dissenting) (renowned archaeologist Emil Haury once said, "[i]f you want to know what is really going on in a community, look at its garbage") (quoted by W. Rathje, Archaeological Ethnography . . . Because Sometimes It Is Better to Give Than to Receive, in Explorations in Ethnoarchaeology 49, 54 (R. Gould ed. 1978)); Weberman, The Art of Garbage Analysis: You Are What You Throw Away, 76 Esquire 113 (1971) (analyzing trash of various celebrities and drawing conclusions about their private lives). A single bag of trash testifies eloquently to the eating, reading, and recreational habits of the person who produced it. A search of trash, like a search of the bedroom, can relate intimate details about sexual practices, health, and personal hygiene. Like rifling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target's financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests. It cannot be doubted that a sealed trash bag harbors telling evidence of the "intimate activity associated with the 'sanctity of a man's home and the privacies of life,'" which the Fourth Amendment is designed

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[garbage] for collection is an act of abandonment and what happens to it thereafter is not within the protection of the fourth amendment"), cert. denied, 440 U. S. 959 (1979); *Magda* v. *Benson*, 536 F. 2d 111, 112 (CA6 1976) *(per curiam)* ("[F]ederal case law . . . holds that garbage . . . is abandoned and no longer protected by the Fourth Amendment"); *United States* v. *Mustone*, 469 F. 2d 970, 972 (CA1 1972) (when defendant "deposited the bags on the sidewalk he abandoned them"). A reading of the Court's collection of state-court cases reveals an equally unimpressive pattern.

to protect. *Oliver* v. *United States*, 466 U. S. 170, 180 (1984) (quoting *Boyd* v. *United States*, 116 U. S. 616, 630 (1886)). See also *United States* v. *Dunn*, 480 U. S. 294, 300 (1987).

The Court properly rejects the State's attempt to distinguish trash searches from other searches on the theory that trash is abandoned and therefore not entitled to an expectation of privacy. As the author of the Court's opinion observed last Term, a defendant's "property interest [in trash] does not settle the matter for Fourth Amendment purposes, for the reach of the Fourth Amendment is not determined by state property law." *Rooney*, *supra*, at 320 (WHITE, J., dissenting). In evaluating the reasonableness of Greenwood's expectation that his sealed trash bags would not be invaded, the Court has held that we must look to "understandings that are recognized and permitted by society."[3] Most of us, I believe, would be incensed to discover a meddler—whether a neighbor, a reporter, or a detective—scrutinizing our sealed trash containers to discover some detail of our personal lives. See *State* v. *Schultz*, 388 So. 2d 1326, 1331 (Fla. App. 1980) (Anstead, J., dissenting). That was, quite naturally, the reaction to the sole incident on which the Court bases its conclusion that "snoops" and the like defeat the expectation of privacy in trash. *Ante*, at 40, and n. 4. When a tabloid reporter examined then-Secretary of State

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[3] *Rakas* v. *Illinois*, 439 U. S. 128, 143–144, n. 12 (1978). See *ante*, at 43 ("[T]he Fourth Amendment analysis must turn on such factors as 'our *societal* understanding that certain areas deserve the most scrupulous protection from government invasion'") (quoting *Oliver* v. *United States*, 466 U. S. 170, 178 (1984)); *Robbins* v. *California*, 453 U. S. 420, 428 (1981) (plurality opinion) ("Expectations of privacy are established by general social norms"); *Dow Chemical Co.* v. *United States*, 476 U. S. 227, 248 (1986) (opinion of Powell, J.); Bush & Bly, Expectation of Privacy Analysis and Warrantless Trash Reconnaissance after *Katz* v. *United States*, 23 Ariz. L. Rev. 283, 293 (1981) ("[S]ocial custom . . . serves as the most basic foundation of a great many legitimate privacy expectations") (citation omitted).

Henry Kissinger's trash and published his findings, Kissinger was "really revolted" by the intrusion and his wife suffered "grave anguish." N. Y. Times, July 9, 1975, p. A1, col. 8. The public response roundly condemning the reporter demonstrates that society not only recognized those reactions as reasonable, but shared them as well. Commentators variously characterized his conduct as "a disgusting invasion of personal privacy," Flieger, Investigative Trash, U. S. News & World Report, July 28, 1975, p. 72 (editor's page); "indefensible . . . as civilized behavior," Washington Post, July 10, 1975, p. A18, col. 1 (editorial); and contrary to "the way decent people behave in relation to each other," *ibid.*

Beyond a generalized expectation of privacy, many municipalities, whether for reasons of privacy, sanitation, or both, reinforce confidence in the integrity of sealed trash containers by "prohibit[ing] anyone, except authorized employees of the Town . . . , to rummage into, pick up, collect, move or otherwise interfere with articles or materials placed on . . . any public street for collection." *United States* v. *Dzialak*, 441 F. 2d 212, 215 (CA2 1971) (paraphrasing ordinance for town of Cheektowaga, New York). See also *United States* v. *Vahalik*, 606 F. 2d 99, 100 (CA5 1979) *(per curiam); Magda* v. *Benson*, 536 F. 2d 111, 112 (CA6 1976) *(per curiam); People* v. *Rooney*, 175 Cal. App. 3d 634, 645, 221 Cal. Rptr. 49, 56 (1985), cert. dism'd, 483 U. S. 307 (1987); *People* v. *Krivda*, 5 Cal. 3d 357, 366, 486 P. 2d 1262, 1268 (1971), vacated and remanded, 409 U. S. 33 (1972); *State* v. *Brown*, 20 Ohio App. 3d 36, 38, n. 3, 484 N. E. 2d 215, 218, n. 3 (1984). In fact, the California Constitution, as interpreted by the State's highest court, guarantees a right of privacy in trash vis-à-vis government officials. See *Krivda, supra* (recognizing right); *In re Lance W.*, 37 Cal. 3d 873, 886–887, 694 P. 2d 744, 752–753 (1985) (later constitutional amendment abolished exclusionary remedy but left intact the substance of the right).

That is not to deny that isolated intrusions into opaque, sealed trash containers occur. When, acting on their own, "animals, children, scavengers, snoops, [or] other members of the public," *ante*, at 40 (footnotes omitted), *actually* rummage through a bag of trash and expose its contents to plain view, "police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public," *ante*, at 41. That much follows from cases like *Jacobsen*, 466 U. S., at 117, 120, n. 17 (emphasis added), which held that police may constitutionally inspect a package whose "integrity" a private carrier has *already* "compromised," because "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not *already* been frustrated"; and *California* v. *Ciraolo*, 476 U. S. 207, 213–214 (1986) (emphasis added), which held that the Fourth Amendment does not prohibit police from observing what "[a]ny member of the public flying in this airspace who glanced down *could* have seen."

Had Greenwood flaunted his intimate activity by strewing his trash all over the curb for all to see, or had some nongovernmental intruder invaded his privacy and done the same, I could accept the Court's conclusion that an expectation of privacy would have been unreasonable. Similarly, had police searching the city dump run across incriminating evidence that, despite commingling with the trash of others, still retained its identity as Greenwood's, we would have a different case. But all that Greenwood "exposed . . . to the public," *ante*, at 40, were the exteriors of several opaque, sealed containers. Until the bags were opened by police, they hid their contents from the public's view every bit as much as did Chadwick's double-locked footlocker and Robbins' green, plastic wrapping. Faithful application of the warrant requirement does not require police to "avert their eyes from evidence of criminal activity that could have been observed by any member of the public." Rather, it only requires them to adhere to norms of privacy that members of the public plainly acknowledge.

The mere *possibility* that unwelcome meddlers *might* open and rummage through the containers does not negate the expectation of privacy in their contents any more than the possibility of a burglary negates an expectation of privacy in the home; or the possibility of a private intrusion negates an expectation of privacy in an unopened package; or the possibility that an operator will listen in on a telephone conversation negates an expectation of privacy in the words spoken on the telephone. "What a person . . . seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected." *Katz*, 389 U. S., at 351–352. We have therefore repeatedly rejected attempts to justify a State's invasion of privacy on the ground that the privacy is not absolute. See *Chapman* v. *United States*, 365 U. S. 610, 616–617 (1961) (search of a house invaded tenant's Fourth Amendment rights even though landlord had authority to enter house for some purposes); *Stoner* v. *California*, 376 U. S. 483, 487–490 (1964) (implicit consent to janitorial personnel to enter motel room does not amount to consent to police search of room); *O'Connor* v. *Ortega*, 480 U. S. 709, 717 (1987) (a government employee has a reasonable expectation of privacy in his office, even though "it is the nature of government offices that others—such as fellow employees, supervisors, consensual visitors, and the general public—may have frequent access to an individual's office"). As JUSTICE SCALIA aptly put it, the Fourth Amendment protects "privacy . . . not solitude." *O'Connor*, *supra*, at 730 (opinion concurring in judgment).

Nor is it dispositive that "respondents placed their refuse at the curb for the express purpose of conveying it to a third party, . . . who might himself have sorted through respondents' trash or permitted others, such as the police, to do so." *Ante*, at 40. In the first place, Greenwood can hardly be faulted for leaving trash on his curb when a county ordinance commanded him to do so, Orange County Code § 4–3–45(a) (1986) (must "remov[e] from the premises at least once each week" all "solid waste created, produced or accumulated in or about [his] dwelling house"), and prohibited him from disposing of it in any other way, see Orange County Code § 3–3–85 (1988) (burning trash is unlawful). Unlike in other circumstances where privacy is compromised, Greenwood could not "avoid exposing personal belongings . . . by simply leaving them at home." *O'Connor, supra,* at 725. More importantly, even the voluntary relinquishment of possession or control over an effect does not necessarily amount to a relinquishment of a privacy expectation in it. Were it otherwise, a letter or package would lose all Fourth Amendment protection when placed in a mailbox or other depository with the "express purpose" of entrusting it to the postal officer or a private carrier; those bailees are just as likely as trash collectors (and certainly have greater incentive) to "sor[t] through" the personal effects entrusted to them, "or permi[t] others, such as police to do so." Yet, it has been clear for at least 110 years that the possibility of such an intrusion does not justify a warrantless search by police in the first instance. See *Ex parte Jackson,* 96 U. S. 727 (1878); *United States* v. *Van Leeuwen,* 397 U. S. 249 (1970); *United States* v. *Jacobsen, supra.*[4]

III

In holding that the warrantless search of Greenwood's trash was consistent with the Fourth Amendment, the Court paints a grim picture of our society. It depicts a society in which local authorities may command their citizens to dispose of their personal effects in the manner least protective of the

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[4] To be sure, statutes criminalizing interference with the mails might reinforce the expectation of privacy in mail, see, *e. g.,* 18 U. S. C. §§ 1701–1705, 1708, but the expectation of privacy in no way depends on statutory protection. In fact, none of the cases cited in the text even mention such statutes in finding Fourth Amendment protection in materials handed over to public or private carriers for delivery.

"sanctity of [the] home and the privacies of life," *Boyd* v. *United States*, 116 U. S., at 630, and then monitor them arbitrarily and without judicial oversight—a society that is not prepared to recognize as reasonable an individual's expectation of privacy in the most private of personal effects sealed in an opaque container and disposed of in a manner designed to commingle it imminently and inextricably with the trash of others. *Ante*, at 39. The American society with which I am familiar "chooses to dwell in reasonable security and freedom from surveillance," *Johnson* v. *United States*, 333 U. S. 10, 14 (1948), and is more dedicated to individual liberty and more sensitive to intrusions on the sanctity of the home than the Court is willing to acknowledge.

I dissent.

CITY OF NEW YORK ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-339. Argued March 29, 1988—Decided May 16, 1988

In 1974, after two years of unsatisfactory experience with conflicting federal and local technical standards governing the transmission of cable television broadcast signals, the Federal Communications Commission (FCC or Commission) promulgated regulations pre-empting the field of signal-quality regulation. In 1984, this Court broadly approved the preemptive authority that the FCC had asserted over cable system regulation. *Capital Cities Cable, Inc.* v. *Crisp,* 467 U. S. 691. A few months later, Congress enacted the Cable Communications Policy Act of 1984 (Cable Act or Act), which empowers state or local authorities to enfranchise cable systems and to specify the facilities and equipment that franchisees could use, but which also authorizes the FCC to establish technical standards for such facilities and equipment. Pursuant to the latter provision, the FCC adopted regulations establishing technical standards governing the quality of cable signals and forbidding local authorities to impose more stringent technical standards. Petitioners sought review of the regulations in the Court of Appeals, contesting the scope of the FCC's claimed pre-emptive authority and asserting that franchising authorities could impose stricter technical standards than the Commission's. The court upheld the regulations.

Held: The FCC did not exceed its statutory authority by forbidding local authorities to impose technical cable signal quality standards more stringent than those set forth in the Commission's regulations. Pp. 63-70.

(a) Whether a federal agency has properly determined that its authority in a given area is exclusive and pre-empts any state regulatory efforts does not depend on the existence of express congressional authorization to displace state law. Rather, the correct focus is on the agency itself and on the proper bounds of its lawful authority to undertake such action. If the agency's decision to pre-empt represents a reasonable accommodation of conflicting policies committed to the agency's care by statute, the accommodation should not be disturbed unless it appears from the statute or its legislative history that the accommodation "is not one that Congress would have sanctioned." *United States* v. *Shimer,* 367 U. S. 374, 383. Pp. 63-64.

(b) In adopting the regulations at issue, the FCC explicitly stated its intent to continue its prior policy of exercising exclusive authority and of pre-empting state and local regulation, in order to address the potentially serious adaptability and cost problems created for cable system operators and consumers by technical standards that vary from community to community. Thus, this case does not turn on whether there is an actual conflict between federal and state law, or whether compliance with both federal and state standards would be physically impossible. Pp. 65–66.

(c) The FCC acted within its authority under the Cable Act when it pre-empted state and local regulation. In adopting the statute, Congress acted against a 10-year background of federal pre-emption on this particular issue and at a time shortly after *Crisp* approved FCC pre-emption in very similar respects. Nevertheless, Congress sanctioned in relevant respects the regulatory scheme that the Commission had already been following, without indicating explicit disapproval of the Commission's pre-emption of local technical standards. Given the difficulties the FCC had experienced with inconsistent local standards, it is doubtful that Congress would have meant to overturn pre-emption without discussion or even any suggestion that it was doing so. To the contrary, the legislative history makes clear that the Cable Act was not intended to work any significant change. Thus, nothing in the Act compels the conclusion that the decision to pre-empt "is not one that Congress would have sanctioned." Pp. 66–70.

259 U. S. App. D. C. 191, 814 F. 2d 720, affirmed.

WHITE, J., delivered the opinion for a unanimous Court.

Stephen J. McGrath argued the cause for petitioners. With him on the briefs were *Doron Gopstein*, *Leonard J. Koerner*, *Paul S. Ryerson*, *Robert Alan Garrett*, *Patrick J. Grant*, *Cynthia Pols*, *Lucia A. Dougherty*, and *Edward J. Walsh, Jr.*

Deputy Solicitor General Wallace argued the cause for the federal respondents. With him on the brief were *Solicitor General Fried* and *Diane S. Killory*. *H. Bartow Farr III* argued the cause for respondent National Cable Television Association, Inc. With him on the brief were *Brenda L. Fox*, *Michael S. Schooler*, and *Seth A. Davidson.**

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*Briefs of *amici curiae* urging reversal were filed for Montgomery County, Maryland, et al. by *James J. Wilson*, *Nicholas P. Miller*, *W. Ran-*

JUSTICE WHITE delivered the opinion of the Court.

The Federal Communications Commission has adopted regulations that establish technical standards to govern the quality of cable television signals and that prohibit local authorities from imposing more stringent technical standards. The issue is whether in doing so the Commission has exceeded its statutory authority.

I

This case deals with yet another development in the ongoing efforts of federal, state, and local authorities to regulate different aspects of cable television over the past three decades. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 700–705 (1984); *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, 161–178 (1968). With the incipient development of cable television in the 1950's and 1960's from what had been more generally known as community antenna television systems, the Federal Communications Commission began to assert regulatory authority in this area. See *CATV Second Report and Order*, 2 F. C. C. 2d 725 (1966). In 1972, the Commission first asserted authority over technical aspects of cable television and devised technical standards to govern the transmission of broadcast signals by cable, though without pre-empting regulation of similar matters by state or local franchising authorities. *Cable Television Report and Order*, 36 F. C. C. 2d 143, on reconsideration, 36 F. C. C. 2d 326 (1972), aff'd *sub nom. American Civil Liberties Union* v. *FCC*, 523 F. 2d 1344 (CA9 1975).[1] Within two years, however, the Commission became convinced from its experience

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dolph Young, and *Larrine S. Holbrooke;* and for the U. S. Conference of Mayors et al. by *Benna Ruth Solomon* and *Beate Bloch*.

[1] The "technical standards" established by the Commission describe, in quantitative terms, various electrical characteristics of the audio and video components of the signals delivered by the cable system to its subscribers, including such specific items as visual carrier frequency, aural center frequency, visual signal level, terminal isolation, and radiation and signal leakage. See 47 CFR §§ 76.601, 76.605 (1987).

with conflicting federal and local technical standards that there is "a compelling need for national uniformity in cable television technical standards" which would require it to pre-empt the field of signal-quality regulation in order to meet the "necessity to rationalize, interrelate, and bring into uniformity the myriad standards now being developed by numerous jurisdictions." *Cable Television Report and Order*, 49 F. C. C. 2d 470, 477, 480 (1974). The Commission explained that a multiplicity of mandatory and nonuniform technical requirements undermined "the ultimate workability of the over-all system," could have "a deleterious effect on the development of new cable services," and could "seriously imped[e]" the "development and marketing of signal source, transmission, and terminal equipment." *Id.*, at 478–479.[2]

In 1984, the Court approved the pre-emptive authority that the Commission had asserted over the regulation of cable television systems. We held that in the Communications Act of 1934, Congress authorized the Commission "to regulate all aspects of interstate communication by wire or radio," including the subsequently developed medium of cable television, and that the Commission's authority "extends to all regulatory actions 'necessary to ensure the achievement of the Commission's statutory responsibilities.'" *Crisp, supra,* at 700, quoting *FCC* v. *Midwest Video Corp.*, 440 U. S. 689, 706 (1979). Although the state law that was invalidated in *Crisp* regulated commercial advertising on cable television, rather than the technical quality of cable television signals, the Court recognized that for 10 years the Commission had "retained exclusive jurisdiction over all operational aspects of cable communication, including signal carriage and technical standards." *Crisp, supra,* at 702.

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[2] Although the Commission recognized that "[t]he broad pre-emptive policy we are adopting today will ultimately affect all cable systems," 49 F. C. C. 2d, at 480, it fashioned this policy to have a more gradual effect. Because "many of the pre-existing technical standards adopted by cities and states cannot be shown to adversely affect our stated goals," the Commission decided to extend a "grandfather" approval to those technical standards that were already operational or certified to the Commission by January 1, 1975. *Ibid.* In addition, a mechanism was established (and remains in effect) that allows state and local authorities to impose "different or additional technical standards" if they obtain a specific waiver from the Commission. *Id.*, at 480–481; see n. 5, *infra.*

A few months after the Court's decision in *Crisp,* Congress enacted the Cable Communications Policy Act of 1984 (Cable Act or Act), 98 Stat. 2780, 47 U. S. C. §§521–559 (1982 ed., Supp. IV). Among its objectives in passing the Cable Act, Congress purported to "establish a national policy concerning cable communications" and to "minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U. S. C. §§521(1), (6) (1982 ed., Supp. IV). The Act was also intended to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems" through procedures and standards that "encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community." §§521(3), (2) (1982 ed., Supp. IV).

The Cable Act left franchising to state or local authorities; those authorities were also empowered to specify the facilities and equipment that franchisees were to use, provided such requirements were "consistent with this title." Cable Act, §§624(a),(b), 47 U. S. C. §§544(a),(b) (1982 ed., Supp. IV). Section 624(e) of the Cable Act provided that "[t]he Commission may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise." 47 U. S. C. §544(e) (1982 ed., Supp. IV).

In 1985, the Commission promulgated regulations that would establish technical standards governing signal quality for one of four different classes of cable television channels and that would forbid local cable franchising authorities to impose their own standards on any of the four classes of channels. 50 Fed. Reg. 7801, 7802 (1985), 47 CFR pt. 76 (1986).

The Commission eventually adopted a modified version of these regulations, which reaffirmed the Commission's established policy of pre-empting local regulation of technical signal quality standards for cable television. 50 Fed. Reg., at 52462, 52464–52465. The Commission found its statutory authority to adopt the regulations in § 624(e) of the Cable Act, 47 U. S. C. § 544(e) (1982 ed., Supp. IV), and in 47 U. S. C. §§ 154(i) and 303(r). 50 Fed. Reg., at 52466. Petitioners (the cities of New York, Miami, and Wheaton, and the National League of Cities) sought review of the regulations in federal court, where they contested the scope of the pre-emptive authority claimed by the Commission and insisted that franchising authorities could impose stricter technical standards than those specified by the Commission.

The Court of Appeals granted partial relief to petitioners. 259 U. S. App. D. C. 191, 814 F. 2d 720 (1987). It noted that the Commission had adopted technical standards applicable to one class of cable television channels, but had left the other three classes of channels completely unregulated. It agreed with petitioners that the Commission had acted arbitrarily and capriciously when it did not adopt technical standards for the latter three classes of channels, yet prohibited local authorities from adopting such standards and ignored the apparent conflict between these actions and the language of the Cable Act. It therefore vacated this part of the rule and remanded to the Commission for further proceedings. The court's holding was unanimous on this point, and that part of its decision is not at issue here.[3]

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[3] At argument, petitioners contended that the question of the Commission's statutory authority to regulate these other three classes of cable channels is properly presented to the Court in this case. Tr. of Oral Arg. 5–7, 9–10. We disagree. The Court of Appeals explicitly failed to resolve this question because it agreed "with petitioner's alternative argument that the FCC's . . . rulemaking was arbitrary and capricious." 259 U. S. App. D. C. 191, 197–198, 814 F. 2d 720, 726–727 (1987). The Court of Appeals' disposition with respect to these three classes of cable channels was to vacate those portions of the rule and to remand to the Commission for

The Court of Appeals divided, however, over the propriety of the Commission's technical standards that apply to the first class of cable channels and that pre-empt more stringent local regulations. The majority of the panel upheld pre-emption, ruling that Congress intended federal regulations like these to supersede local law and that the Commission acted within the broad confines of the pre-emptive authority delegated to it by Congress when it adopted the regulations with respect to this one class of channels. One judge dissented, contending that the majority had sanctioned pre-emption without a clear manifestation of congressional intent, contrary to this Court's decisions. We granted certiorari, 484 U. S. 962 (1987), and we now affirm.

II

When the Federal Government acts within the authority it possesses under the Constitution, it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes. The Supremacy Clause of the Constitution gives force to federal action of this kind by stating that "the Laws of the United States which shall be made in Pursuance" of the Constitution "shall be the supreme Law of the Land." U. S. Const., Art. VI, cl. 2. The phrase "Laws of the United States" encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization. For this reason, at the same time that our decisions have established a number of ways in which Congress can be understood to have pre-empted state law, see *Louisiana Public Service Comm'n* v. *FCC*, 476 U. S. 355, 368–369 (1986), we have also recognized that "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state

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further proceedings. In their brief, moreover, petitioners refer specifically to "a vote of 2–1 [in] the Court of Appeals" in stating the questions presented, which was the disposition below only with respect to the one class of cable channels. Brief for Petitioners i.

regulation" and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law. *Id.*, at 369.

This case involves the latter kind of pre-emption, and here the inquiry becomes whether the federal agency has properly exercised its own delegated authority rather than simply whether Congress has properly exercised the legislative power. Thus we have emphasized that in a situation where state law is claimed to be pre-empted by federal regulation, a "narrow focus on Congress' intent to supersede state law [is] misdirected," for "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 154 (1982). Instead, the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action. The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof. Beyond that, however, in proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area. *Crisp*, 467 U. S., at 700; *De la Cuesta, supra*, at 152–154. It has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies. Where this is true, the Court has cautioned that even in the area of pre-emption, if the agency's choice to pre-empt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *United States* v. *Shimer*, 367 U. S. 374, 383 (1961); see also *Crisp, supra*, at 700.

III

A

In this case, there is no room for doubting that the Commission intended to pre-empt state technical standards governing the quality of cable television signals. In adopting the regulations at issue here, the Commission said:

> "Technical standards that vary from community to community create potentially serious negative consequences for cable system operators and cable consumers in terms of the cost of service and the ability of the industry to respond to technological changes. To address this problem, we proposed in the *Notice* to retain technical standards guidelines at the federal level which could be used, but could not be exceeded, in state and local technical quality regulations.
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> . . . . .
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> "After a review of the record in this proceeding, we continue to believe that the policy adopted in 1974 was effective, should remain in force, and is entirely consistent with both the specific provisions and the general policy objectives underlying the 1984 Cable Act. This preemption policy has constrained state and local regulation of cable technical performance to Class I channels and has prohibited performance standards more restrictive than those contained in the Commission's rules. The reasons that caused the adoption of this policy appear to be as valid today as they were when the policy was first adopted." 50 Fed. Reg., at 52464.

As noted above, the policy adopted by the Commission in 1974, which was continued in effect by the 1985 regulations, was a pre-emptive policy applying in the area of technical standards governing signal quality. 49 F. C. C. 2d, at 477–481. Since the Commission has explicitly stated its intent to exercise exclusive authority in this area and to preempt state and local regulation, this case does not turn on whether there is an actual conflict between federal and state law here, or whether compliance with both federal and state standards would be physically impossible. *De la Cuesta, supra,* at 153.

B

The second part of the inquiry is whether the Commission is legally authorized to pre-empt state and local regulation that would establish complementary or additional technical standards, where it clearly is possible for a cable operator to comply with these standards in addition to the federal standards. We have identified at least two reasons why this part of the inquiry is crucial to our determination of the pre-emption issue. "First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *Louisiana Public Service Comm'n,* 476 U. S., at 374. The second reason was particularly relevant in *Louisiana Public Service Comm'n* because there we were obliged to assess the import of a statutory section in which Congress appeared to have explicitly limited the Commission's jurisdiction, so as to prohibit it from pre-empting state laws concerning the manner in which telephone companies could depreciate certain plant and equipment. *Id.,* at 369–376, 379, construing 47 U. S. C. § 152(b).

We conclude here that the Commission acted within the statutory authority conferred by Congress when it pre-empted state and local technical standards governing the quality of cable television signals. When Congress enacted the Cable Act in 1984, it acted against a background of federal pre-emption on this particular issue. For the preceding 10 years, the Commission had pre-empted such state and local technical standards under its broad delegation of authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter [the communications laws, Title 47 of the U. S. Code, Chapter 5]," as a means of implementing its legitimate discretionary power to determine what the "public convenience, interest, or necessity requires" in this field. 47 U. S. C. §§ 303 and 303(r); see also 49 F. C. C. 2d, at 481; 47 U. S. C. § 154(i). The Court's decision in *Crisp*, which was handed down during the time Congress was considering the legislation that within a few months became the Cable Act, broadly upheld the Commission's pre-emptive authority in very similar respects. 467 U. S., at 701–705.

In the Cable Act, Congress sanctioned in relevant respects the regulatory scheme that the Commission had been following since 1974. In § 624 of the Cable Act, Congress specified that the local franchising authority could regulate "services, facilities, and equipment" in certain respects, and could enforce those requirements, but § 624(e) of the Act grants the Commission the power to "establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise." 47 U. S. C. §§ 544(a)–(e) (1982 ed., Supp. IV). This mirrors the state of the regulatory law before the Cable Act was passed, which permitted the local franchising authorities to regulate many aspects of cable services, facilities, and equipment but not to impose technical standards governing cable signal quality, since the Commission had explicitly reserved this power to the Federal Government.

It is also quite significant that nothing in the Cable Act or its legislative history indicates that Congress explicitly disapproved of the Commission's pre-emption of local technical standards.[4] Given the difficulties the Commission had experienced in this area, which had caused it to reverse its ground in 1974 after two years of unhappy experience with the practical consequences of inconsistent technical standards imposed by various localities, we doubt that Congress intended to overturn the Commission's decade-old policy without discussion or even any suggestion that it was doing so. To the contrary, the House Report which discusses this section of the Act portrays it as nothing more than a straightforward endorsement of current law:

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[4] Petitioners argue that by empowering local franchising authorities to take into account whether "the quality of the operator's service, including signal quality . . . has been reasonable in light of community needs," 47

> "Subsection (e) allows the Commission to set technical standards related to facilities and equipment required by a franchising authority pursuant to a franchising agreement. This provision does not affect the authority of a franchising authority to establish standards regarding facilities and equipment in the franchise pursuant to section 624(b) which are not inconsistent with standards established by the FCC under this subsection." H. R. Rep. No. 98-934, p. 70 (1984).

This passage from the House Report makes clear that the Act was not intended to work any significant change in the law in the respects relevant to this case. By noting that § 624(e) authorizes "the Commission to set technical standards related to facilities and equipment" and that it "does not affect the authority of a franchising authority to establish standards regarding facilities and equipment" that are not inconsistent with Commission standards, the House Report indicates both that Congress did not intend to remove from the Commission its longstanding power to establish pre-emptive

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U. S. C. § 546(c)(1)(B) (1982 ed., Supp. IV), Congress implicitly recognized that local franchising authorities would need a comprehensive set of additional technical standards in order to carry out this task. Yet this argument simply ignores the fact that local authorities are able to assess signal quality against the technical standards set by the Commission, which it has found are adequate to ensure "an acceptable quality of service at the worst subscriber location and thus a better quality of service to the average subscriber." 50 Fed. Reg. 52462, 52463, n. 2 (1985).

technical standards, and that Congress did not intend to "affect the authority of a franchising authority" to set standards in these and similar matters regarding cable facilities and equipment. In particular, Congress did not manifest any intent to "affect the authority" of local franchising authorities by giving them the power to supplement the technical standards set by the Commission with respect to the quality of cable signals, a power which they generally had not been permitted to exercise for the last 10 years and which, according to the Commission's consistent view, disserves the public interest.[5] Petitioners insist that under § 624, as evidenced by the passage from the House Report quoted above, a franchising authority may specify any technical standards that do not conflict with Commission standards and hence may set stricter standards for signal quality. But this disregards the Commission's own power to pre-empt, an authority that we do not believe Congress intended to take away in the Cable Act. And it also disregards the Commission's explicit findings, based on considerable experience in this area, that complementary or additional technical standards set by state and local authorities do conflict with the basic objectives of federal policy with respect to cable television—findings that the Commission first articulated in 1974 and then reiterated in 1986. See 49 F. C. C. 2d, at 478–479; 50 Fed. Reg., at 52464–52465.

In sum, we find nothing in the Cable Act which leads us to believe that the Commission's decision to pre-empt local technical standards governing the quality of cable signals "is not one that Congress would have sanctioned." *Shimer*, 367

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[5] Petitioners and other state and local authorities remain free, of course, to petition the Commission for an individualized waiver that would permit them to "impose additional or different requirements," which they may seek to obtain by demonstrating that particular local conditions create special problems that make the federal technical standards inadequate. See 47 CFR § 76.7 (1987).

U. S., at 383.[6] We therefore affirm the judgment of the Court of Appeals.

It is so ordered.

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[6] Since we conclude that the Commission is authorized under § 624(e) of the Cable Act to pre-empt technical standards imposed by state and local authorities, we need not also consider whether the Commission retains the same broad pre-emptive authority in the area of cable television under §§ 4(i) and 303 of the Communications Act of 1934, as amended, 47 U. S. C. §§ 154(i) and 303, that it had exercised before the Cable Act was enacted in 1984. In adopting the regulations at issue here, the Commission claimed to possess statutory authority under those two sections of the Communications Act as well as under the new Cable Act. 50 Fed. Reg., at 52466. Petitioners claim that the Cable Act withdrew such authority from the Commission, and their claim draws some support from new language in 47 U. S. C. § 152(a) (1982 ed., Supp. IV), which states that "[t]he provisions of [the Communications Act] shall apply with respect to cable service . . . as provided in [the Cable Act]." On the other hand, the House Report suggests that this language is merely a more explicit grant of "exclusive jurisdiction" to the Commission over specified aspects of cable service, see H. R. Rep. No. 98-934, pp. 95-96 (1984), which settles matters that had occasionally been in dispute. In addition, § 303 of the Communications Act continues to give the Commission broad rulemaking power "as may be necessary to carry out the provisions of this chapter," 47 U. S. C. § 303(r), which includes the body of the Cable Act as one of its subchapters. But since in any event the Commission possesses statutory authority to adopt the regulations at issue in this case under § 624(e) of the Cable Act, we do not decide whether the Commission's actions are authorized on this alternative basis as well.

BANKERS LIFE & CASUALTY CO. *v.* CRENSHAW

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

No. 85-1765. Argued November 30, 1987—Decided May 16, 1988

In a state-court suit upon an insurance claim for loss of a limb, the jury awarded appellee the $20,000 provided by his policy and punitive damages of $1.6 million based on appellant's bad-faith refusal to pay the claim. Concluding that the punitive damages award was not excessive in light of appellant's financial worth and the degree of its wrongdoing, the Mississippi Supreme Court affirmed the verdict without modification, and assessed an additional 15% penalty against appellant in accordance with a state statute imposing such a penalty on parties who appeal unsuccessfully from money judgments or other categories of judgments whose value may be readily determined. Although the appeal had not raised a federal constitutional challenge to the size of the punitive damages award, appellant argued, in its petition for rehearing, that the award "was clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive fine, and violates constitutional principles." Appellant's Motion to Correct Judgment also alleged that the statutory penalty violated its equal protection rights under the Federal and State Constitutions. Without opinion, the State Supreme Court denied the petition for rehearing and the Motion to Correct Judgment.

Held:

1. This Court will not reach appellant's claims that the punitive damages award violated the Due Process, Contract, and Excessive Fines Clauses of the Federal Constitution, since those claims were not raised and passed upon in state court. *Hathorn* v. *Lovorn,* 457 U. S. 255, distinguished. The petition for rehearing's vague and general appeal to constitutional principles was insufficient to adequately raise the Contract Clause or due process claims. Similarly, the petition's reference to the award's excessiveness is too oblique to have properly raised the Federal Excessive Fines Clause claim, since no mention was made of the Clause, the Federal Constitution, or federal law, and the Mississippi Constitution contains its own Excessive Fines Clause, which the State Supreme Court could have taken to underlie the excessiveness challenge if it understood appellant to be offering a constitutional challenge. Assuming that this Court's "not pressed or passed upon below" rule is not jurisdictional but is merely a prudential restriction, the more prudent course here is to decline review of the important and difficult Federal Excessive Fines Clause issue. This course will permit a number of less intrusive,

and possibly more appropriate, resolutions by the state legislature or courts, while any ultimate review of the question in this Court will gain the benefit of a well-developed record and a reasoned opinion on the merits by the State Supreme Court. Pp. 76–80.

2. Mississippi's penalty statute does not violate the Equal Protection Clause of the Fourteenth Amendment, since it is reasonably tailored to achieve the State's legitimate objectives of discouraging frivolous appeals, compensating appellees for the intangible costs of litigation, and conserving judicial resources. The statute does not discriminate against a particular class of appellants in an arbitrary and irrational fashion, since it broadly applies to both plaintiffs and defendants, as well as to a variety of specified types of readily determined judgments, and since its limitation to appellants from such judgments represents a rational, if partial, attempt to deter frivolous appeals without the substantial judicial intervention that the inclusion of other types of claims would require. Moreover, the statute poses little danger of discouraging meritorious appeals along with insubstantial ones, since the 15% penalty operates only after a judgment has been affirmed without modification and represents a relatively modest additional assessment. *Lindsey* v. *Normet*, 405 U. S. 56, distinguished. Although the State might have enacted a statute that more precisely served the intended goals, perfection is not required under the rational-basis test. Pp. 80–85.

483 So. 2d 254, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, J., joined, in all but Part II of which WHITE, J., joined, in all but Part II and n. 1 of which O'CONNOR and SCALIA, JJ., joined, and in all but Part III of which BLACKMUN, J., joined. WHITE, J., filed an opinion concurring in part, in which SCALIA, J., joined, *post*, p. 85. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in which SCALIA, J., joined, *post*, p. 86. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 89. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 89. STEVENS and KENNEDY, JJ., took no part in the consideration or decision of the case.

Theodore B. Olson argued the cause for appellant. With him on the briefs were *Larry L. Simms* and *Terence P. Ross*.

Bruce J. Ennis, Jr., argued the cause for appellee. With him on the brief were *Paul R. Friedman*, *Ernest R. Schroeder*, and *Vincent J. Castigliola, Jr.**

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*Briefs of *amici curiae* urging reversal were filed for the Alliance of American Insurers et al. by *Ellis J. Horvitz* and *S. Thomas Todd;* for the

JUSTICE MARSHALL delivered the opinion of the Court.

In this case we must decide whether a Mississippi statute imposing a 15% penalty on parties who appeal unsuccessfully from a money judgment violates the Equal Protection Clause.

I

This action grows out of allegations that appellant Bankers Life and Casualty Company refused in bad faith to pay appellee Lloyd Crenshaw's insurance claim for loss of a limb. According to testimony at trial, appellee was injured on January 6, 1979, when a car alternator he was repairing rolled off his workbench and landed on his foot. Three days later, after the injury had not responded to home treatment, appellee went to the emergency room of the local Air Force base hospital. Hospital doctors prescribed a splint, crutches, and pain medication, and told appellee to return in a week. Appellee revisited the hospital three times over the next five days, each time complaining of continuing pain in his foot. By the last visit, appellee's foot had swollen and begun to turn blue, and the examining doctor recommended a surgery consultation. Appellee was admitted to the hospital, where,

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American Council of Life Insurance et al. by *Erwin N. Griswold, Jack H. Blaine,* and *Phillip E. Stano;* and for Johnson & Higgins by *John Calvin Jeffries, Jr., George Clemon Freeman, Jr.,* and *William F. Kennedy.*

Briefs of *amici curiae* urging affirmance were filed for the Association of Trial Lawyers of America by *Jeffrey Robert White* and *Robert L. Habush;* for the Consumers Union of the U. S. et al. by *Andrew F. Popper;* for the Insurance Consumer Action Network by *Marian Haycock Tully;* for the Mississippi Trial Lawyers Association by *Paul S. Minor;* and for the National Insurance Consumer Organization.

Briefs of *amici curiae* were filed for the State of Mississippi by *Edwin Lloyd Pittman,* Attorney General, and *Robert L. Gibbs,* Assistant Attorney General; for Aetna Life Insurance Co. et al. by *George C. Montgomery, Darrell S. Richey,* and *Thomas J. Norman;* for the Arizona Trial Lawyers Association et al. by *G. David Gage* and *Amy Langerman;* and for CBS Inc. et al. by *P. Cameron DeVore, Marshall J. Nelson, Douglas P. Jacobs, Lawrence Gunnels, Boisfeuillet Jones, Bruce W. Sanford, Harvey L. Lipton,* and *Diana M. Daniels.*

on January 17, an Air Force general surgeon determined that a surgical amputation was necessary. The following day, appellee's leg was amputated below the knee.

At the time of the amputation, appellee was insured under a group policy issued by appellant. The policy provided a $20,000 benefit for loss of limb due to accidental bodily injury. In April 1979, appellee submitted a claim under the policy. Appellant denied the claim. The apparent basis for the denial was an opinion of appellant's Medical Director, Dr. Nathaniel McParland, that the cause of the amputation was not appellee's accident but a pre-existing condition of arteriosclerosis, a degenerative vascular disease. Appellee responded to the company's denial by furnishing a statement signed by three doctors who treated him at the hospital. They stated that appellee's arteriosclerosis was "'an underlying condition and not the immediate cause of the gangrenous necrosis. The precipating [sic] event must be considered to be the trauma which initially brought him to the Emergency Room on 9 January.'" 483 So. 2d 254, 261 (Miss. 1985). Dr. McParland and a company analyst concluded that this statement was inconsequential, and appellant adhered to its position that the arteriosclerosis was responsible for the loss of limb.

Appellee persisted in his efforts to recover under the policy, eventually hiring an attorney, and appellant persisted in its intransigence. In its correspondence with appellee and his attorney, appellant repeatedly asserted that appellee had not suffered an injury as defined in the policy, that is, a "'bodily injury, causing the loss while this policy is in force, directly and independently of all other causes and effected solely through an accidental bodily injury to the insured person.'" *Id.*, at 262, quoting letter of Apr. 8, 1980, from Wm. Herzau to appellee. In contemporaneous internal memoranda, however, appellant noted that notwithstanding the policy language, appellee was entitled to recovery under Mississippi law if his injury had "'"aggravate[d], render[ed] active, or set in motion a latent or dormant pre-existing physical condition or disease.""" *Id.*, at 262, 263. The memoranda also demonstrated that appellant knew its files were incomplete yet never attempted to obtain appellee's medical records, most notably his emergency room report, even though Mississippi law and internal company procedures required such efforts.

After appellant again denied the claim on the ground that there was no evidence that appellee's "'injury caused this loss "directly and independently of all other causes,""" see *id.*, at 263, appellee brought this suit in Mississippi state court. His complaint requested $20,000 in actual damages, and, as amended, $1,635,000 in punitive damages for the tort of bad-faith refusal to pay an insurance claim. The jury awarded appellee the $20,000 provided by the policy and punitive damages of $1.6 million.

The Mississippi Supreme Court affirmed the jury verdict without modification. It concluded that the punitive damages award was not excessive in light of appellant's financial worth and the degree of its wrongdoing. See *id.*, at 279. Because the money judgment was affirmed without modification, a penalty of $243,000, or 15% of the judgment, was assessed against appellant and added to appellee's recovery in accordance with Mississippi's penalty statute. See Miss. Code Ann. § 11–3–23 (Supp. 1987). In its appeal to the Mississippi Supreme Court, appellant did not raise a federal constitutional challenge to the size of the punitive damages award.[1] Following the affirmance of the jury verdict, appellant filed a petition for rehearing. Appellant argued in the petition that "[t]he punitive damage verdict was clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive fine, and violates constitutional principles." App. to Juris. Statement 139a. An accompanying brief asserted that the punitive damages award violated "due process, equal protection, and other constitutional standards." *Id.*, at 151a. Appellant also filed a Motion to Correct Judgment in which it alleged that the 15% penalty under § 11–3–23 "violat[ed] the rights of equal protection and due process of Bankers Life" guaranteed in the Federal and State Constitutions. App. to Juris. Statement 106a–107a. The Mississippi Supreme Court, without opinion, denied the petition for rehearing and overruled the Motion to Correct Judgment.

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[1] Appellant did offer on appeal a federal due process challenge based on the alleged "chilling effect" of unrestricted punitive damages awards on the exercise of a litigant's right of access to the courts. See App. to Juris. Statement 135a. We read this attack on the alleged open-endedness of Mississippi's punitive damages awards to be distinct from the attack on the size of the particular award that appellant has waged before this Court.

II

Appellant focuses most of its efforts in this appeal to challenging the punitive damages award of $1.6 million. It contends foremost that the award violates the Eighth Amendment's guarantee that "excessive fines [shall not be] imposed." Appellant argues first, that the Excessive Fines Clause applies to punitive damages awards rendered in civil cases, and second, that the particular award in this case was constitutionally excessive. In addition to its excessive fines claim, appellant challenges the punitive damages award in this case on the grounds that it violates the Due Process Clause and the Contract Clause. Although we noted probable jurisdiction as to all of the questions presented in appellant's jurisdictional statement, appellant's challenges to the size of the punitive damages award do not fall within our appellate jurisdiction. See 28 U. S. C. § 1257(2). We therefore treat them as if contained in a petition for a writ of certiorari, and our unrestricted notation of probable jurisdiction of the appeal is to be understood as a grant of the writ as to these claims. See *Mishkin* v. *New York*, 383 U. S. 502, 512 (1966). We conclude, however, that these claims were not raised and passed upon in state court, and we decline to reach them here. See *ibid.* ("The issue thus remains within our certiorari jurisdiction, and we may, for good reason, even at this stage, decline to decide the merits of the issue, much as we would dismiss a writ of certiorari as improvidently granted").

Appellant maintains that it raised its various challenges to the size of the punitive damages award in its petition for rehearing before the Mississippi Supreme Court. In urging us to entertain the claims, appellant relies on our decision in *Hathorn* v. *Lovorn*, 457 U. S. 255, 262–265 (1982), in which we accepted certiorari jurisdiction of claims that were raised, but not passed upon, in the Mississippi Supreme Court on petition for rehearing. *Hathorn* would be apposite were we to conclude that appellant had adequately raised its claims on rehearing. But appellant's petition for rehearing alleged only that the punitive damages award "was clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive fine, and violates constitutional principles." App. to Juris. Statement 139a. The vague appeal to constitutional principles does not preserve appellant's Contract Clause or due process claims. A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon. Cf. *Taylor* v. *Illinois*, 484 U. S. 400, 407, n. 9 (1988) ("A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights . . .").

Appellant's reference to the excessiveness of the punitive damages award more colorably raises a cognizable constitutional challenge to the size of the award, one based on the Excessive Fines Clause of the Eighth Amendment. But this language as well is too oblique to allow us to conclude that appellant raised before the Mississippi Supreme Court the federal claim it now urges us to resolve. As this Court stated in *Webb* v. *Webb*, 451 U. S. 493, 501 (1981), "[a]t the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." Although the petition for rehearing alleges that the fine is excessive, it does not indicate that the fine is excessive as a constitutional matter, be it state or federal. It certainly does not identify the Excessive Fines Clause of the Eighth Amendment to the Federal Constitution as the source of appellant's claim. Indeed, the crucial language from appellant's petition contains no reference whatsoever to the Eighth Amendment, the Federal Constitution, or federal law. This failure to invoke the Federal Constitution is especially problematic in this case because the Mississippi Constitution contains its own Excessive Fines Clause. Miss. Const., Art. 3, § 28. Thus, even if the Mississippi Supreme Court understood appellant to be offering a constitutional challenge, it may very well have taken that challenge to be anchored in the State Constitution. Cf. *Webb*, 451 U. S., at 496–498 (finding that party's reference to "full faith and credit" in state-court proceedings had failed to raise a federal constitutional claim even though the State Constitution contained no full faith and credit clause); *id.*, at 502–503 (MARSHALL, J., dissenting). We therefore conclude that appellant's Eighth Amendment challenge, like its other challenges to the size of the punitive damages award, was not properly raised below.[2]

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[2] Similarly, appellant's challenges in this Court to the size of the punitive damages award in no way qualify as "mere enlargements" of claims made before the Mississippi Supreme Court. Under the mere enlargement doctrine, "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Dewey* v. *Des Moines*, 173 U. S. 193, 198 (1899). See also *Stanley* v. *Illinois*, 405 U. S. 645, 658, n. 10 (1972). *Dewey* makes clear, however, that the federal question must be brought to the attention of the court below in some manner. "A claim or right which has never been

Whether appellant's failure to raise these claims in the Mississippi courts deprives us of all power to review them under our certiorari jurisdiction is an unsettled question. As then JUSTICE REHNQUIST wrote for the Court in *Illinois* v. *Gates*, 462 U. S. 213 (1983), the cases have been somewhat inconsistent in their characterization of the "not pressed or passed upon below" rule. Early opinions seemed to treat the requirement as jurisdictional, whereas more recent cases clearly view the rule as merely a prudential restriction that does not pose an insuperable bar to our review. See *id.*, at 218–219 (discussing cases). We are not called on today to conclusively characterize the "not pressed or passed upon below" rule, however, because assuming that the rule is merely prudential, we believe that the more prudent course in this case is to decline to review appellant's claims.

In determining whether to exercise jurisdiction over questions not properly raised below, the Court has focused on the policies that animate the "not pressed or passed upon below" rule. These policies are first, comity to the States, and second, a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal. See *Webb* v. *Webb*, *supra*, at 500–501. Because the chief issue appellant would have us resolve—whether the Eighth Amendment's Excessive Fines Clause serves to limit punitive damages in state civil cases—is a question of some moment and difficulty, these policies apply with special force. See *Illinois* v. *Gates*, *supra*, at 224 ("Where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion"); *Mishkin* v. *New York*, 383 U. S., at 512–513 ("The far-reaching and important questions tendered by this claim are not presented by the record with sufficient clarity to require or justify their decision"). Our review of appellant's claim now would short-circuit a number of less intru-

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made or asserted cannot be said to have been denied by a judgment which does not refer to it." 173 U. S., at 200.

sive, and possibly more appropriate, resolutions: the Mississippi State Legislature might choose to enact legislation addressing punitive damages awards for bad-faith refusal to pay insurance claims;[3] failing that, the Mississippi state courts may choose to resolve the issue by relying on the State Constitution or on some other adequate and independent nonfederal ground; and failing that, the Mississippi Supreme Court will have its opportunity to decide the question of federal law in the first instance, while any ultimate review of the question that we might undertake will gain the benefit of a well-developed record and a reasoned opinion on the merits. We think it unwise to foreclose these possibilities, and therefore decline to address appellant's challenges to the size of the punitive damages award.

III

There remains appellant's challenge to Mississippi's "penalty statute," which requires unsuccessful appellants from money judgments, as well as from several other categories of judgments whose value may readily be determined, to pay an additional assessment of 15% of the judgment.[4] Appellant

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[3] Several States have enacted limits on punitive damages in specified types of causes of action. See, *e. g.*, Fla. Stat. Ann. § 713.31(2)(c) (1988) (fraudulent filing of mechanics' lien); Wash. Rev. Code § 9A.36.080 (1987) (malicious harassment); Cal. Civ. Code Ann. § 1787.3 (West 1985) (consumer credit denial).

[4] Section 11-3-23 of Miss. Code Ann. (Supp. 1987) provides:

"In case the judgment or decree of the court below be affirmed, or the appellant fails to prosecute his appeal to effect, the supremé court shall render judgment against the appellant for damages, at the rate of fifteen percent (15%), as follows: If the judgment or decree affirmed be for a sum of money, the damages shall be upon such sum. If the judgment or decree be for the possession of real or personal property, the damages shall be assessed on the value of the property. If the judgment or decree be for the dissolution of an injunction or other restraining process at law or in chancery, the damages shall be computed on the amount due the appellee which was enjoined or restrained. If the judgment or decree be for the dissolution of an injunction or other restraining process as to certain property, argues that the penalty statute violates the Equal Protection Clause of the Fourteenth Amendment because it singles out appellants from money judgments, and because it penalizes all such appellants who are unsuccessful, regardless of the merit of their appeal. This claim is properly before us under our appellate jurisdiction because the Mississippi Supreme Court, in denying appellant's Motion to Correct Judgment, upheld the validity of § 11–3–23 against appellant's federal constitutional claim. See 28 U. S. C. § 1257(2).

Under this Court's equal protection jurisprudence, Mississippi's statute is "presumed to be valid and will be sustained if the classification . . . is rationally related to a legitimate state interest." *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 440 (1985). The state interests assertedly served by the Mississippi statute were detailed by the Mississippi Supreme Court in *Walters* v. *Inexco Oil Co.*, 440 So. 2d 268 (1983). The penalty statute, some version of which has been part of Mississippi law since 1857, "expresses the state's interest in discouraging frivolous appeals. It likewise expresses a bona fide interest in providing a measure of compensation for the successful appellee, compensation for his

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real or personal, or a certain interest in property, or be a judgment or decree for the sale of property, or some interest in it, to satisfy a sum out of the proceeds of sale, or to enforce or establish a lien or charge or claim upon or some interest in property, and the only matter complained of on the appeal is the decree as to some particular property or claim on it, the damages shall be computed on the value of the property or the interest in it, if the value of the property or interest in it be less than the judgment or decree against it; but if the value of the property or interest in it be greater than the amount of the judgment or decree against it, the damages shall be upon the amount of the judgment or decree; provided, however, the above penalty shall not be assessed against any condemnee appealing from a special court of eminent domain in any circumstances."

The penalty would appear to apply to both defendant-appellants, such as Bankers Life, and plaintiff-appellants, who might choose to challenge a recovery they view as too meager. See *Eagle Lumber & Supply Co.* v. *Robertson*, 161 Miss. 17, 135 So. 499 (1931) (applying former Mississippi penalty statute to unsuccessful plaintiff-appellant).

having endured the slings and arrows of successful appellate litigation." *Id.*, at 274–275. In a similar vein, the statute protects the integrity of judgments by discouraging appellant-defendants from prolonging the litigation merely to "squeeze a favorable settlement out of an impecunious" appellee. *Id.*, at 275. Also, the penalty statute "tells the litigants that the trial itself is a momentous event, the centerpiece of the litigation, not just a first step weighing station en route to endless rehearings and reconsiderations." *Ibid.* Finally, in part because it serves these other goals, the penalty statute furthers the State's interest in conserving judicial resources. *Ibid.*

The legitimacy of these state interests cannot seriously be doubted, and this Court has upheld statutes that serve similar interests. See, *e. g.*, *Life & Casualty Ins. Co.* v. *McCray*, 291 U. S. 566 (1934) (upholding additional assessment on insurance companies that wrongfully refuse to pay policy benefits); see also, *Louisville & Nashville R. Co.* v. *Stewart*, 241 U. S. 261, 263 (1916) (State may make appeal "costly in cases where ultimately the judgment is upheld") (Holmes, J.). Cf. *Lindsey* v. *Normet*, 405 U. S. 56, 78 (1972) ("We do not question here reasonable procedural provisions to safeguard litigated property . . . or to discourage patently insubstantial appeals") (citation omitted). The statute therefore offends the Equal Protection Clause only if the legislative means that Mississippi has chosen are not rationally related to these legitimate interests.

In arguing that § 11–3–23 violates equal protection, appellant seeks to draw support from the Court's opinion in *Lindsey* v. *Normet*, *supra*. *Lindsey* addressed the constitutionality of an Oregon statute that required tenants challenging eviction proceedings to post a bond of twice the amount of rent expected to accrue pending appellate review. The bond was forfeited to the landlord if the lower court decision was affirmed. We agreed with the appellants that the double-bond requirement violated the Equal Protection Clause.[5] We noted that the requirement was "unrelated to actual rent accrued or to specific damage sustained by the landlord." 405 U. S., at 77. Moreover, the requirement, which burdened only tenants, including tenants whose appeals were nonfrivolous, erected "a substantial barrier to appeal faced by no other civil litigant in Oregon." *Id.*, at 79. We therefore concluded that the requirement bore "no reasonable relationship to any valid state objective" and that it discriminated against the class of tenants appealing from adverse decisions in wrongful-detainer actions in an "arbitrary and irrational" fashion. *Id.*, at 76–77, 79.

As *Lindsey* demonstrates, arbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review. Unlike the statute in *Lindsey*, however, Mississippi's penalty statute does not single out a class of appellants in an arbitrary and irrational fashion. First, whereas the statute in *Lindsey* singled out the narrow class of defendant-tenants for discriminatory treatment, the sweep of § 11–3–23 is far broader: the penalty applies both to plaintiffs and defendants, and it also applies to all money judgments as well as to a long list of judgments whose money value may readily be determined. See n. 6, *infra*. Second, and more generally, there is a rational connection between the statute's objective and Mississippi's choice to impose a penalty only on appellants from money judgments or judgments the money value of which can readily be determined. If Mississippi wanted similarly to deter frivolous appeals from other kinds of judgments, it either would have to erect a fixed bond that bore no relation to the value of the underlying suit, or else it would have to set appropriate penalties in each case using some kind of individualized procedure, which would impose a considerable cost in judicial resources, exactly what the statute aims to avoid. Mississippi instead has chosen a partial solution that will deter many, though not all, frivolous appeals without requiring a significant commitment of governmental resources. Appellants from money judgments, and from the other types of judgments delineated in the statute, are a rational target of this scheme because the value of their claims, and thus of a proportional penalty, may be readily computed without substantial judicial intervention. Cf. *Lindsey*, *supra*, at 78 ("We discern nothing in the special purposes of the [wrongful detainer] statute or in the special characteristics of the landlord-tenant relationship to warrant this discrimination"). The Constitution does not prohibit Mississippi from singling out a group of litigants that it rationally concludes is most likely to be deterred from bringing meritless claims at the least cost to the State.

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[5] The appellants in *Lindsey* also attacked the constitutionality of provisions of the statute that required tenants challenging eviction proceedings to proceed to trial within six months and to bring only certain claims and defenses. The Court upheld these provisions against appellants' facial challenge. *Lindsey* v. *Normet*, 405 U. S., at 64–69.

In addition, Mississippi's statute is less likely than was the statute in *Lindsey* to discourage substantial appeals along with insubstantial ones. Because the penalty operates only after a judgment has been affirmed without modification, there is less risk than in *Lindsey* of discouraging appellants who believe they have meritorious appeals but simply lack the funds to post a substantial bond during the appellate process.[6] And whereas the assessment in *Lindsey* "automatically doubled the stakes," 405 U. S. at 79, the 15% penalty here is a relatively modest additional assessment. Cf.

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[6] Appellant argues that § 11-3-23 impermissibly burdens some litigants' access to the State's appellate system. Although the Court indicated in *Lindsey* that the effective foreclosure of a state right to appeal as to some litigants only—for example, indigent litigants—might well violate equal protection guarantees under even deferential scrutiny, see *Lindsey*, *supra*, at 77, 79, appellee rightly notes that appellant lacks standing to challenge § 11-3-23 on this basis, because appellant has not alleged that its own right to appeal has been foreclosed by the statute. See *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610 (1973).

McCray, 291 U. S., at 571 (12% additional assessment not oppressive). Although Mississippi may not have succeeded in eliminating all danger of deterring meritorious claims, we cannot say that the residual danger is sufficient to render the statutory scheme irrational.

In short, unlike the double-bond provision condemned in *Lindsey*, the means chosen in § 11–3–23 are reasonably related to the achievement of the State's objectives of discouraging frivolous appeals, compensating appellees for the intangible costs of litigation, and conserving judicial resources. See *Lindsey*, 405 U. S., at 70. It of course is possible that Mississippi might have enacted a statute that more precisely serves these goals and these goals only; as we frequently have explained, however, a state statute need not be so perfectly calibrated in order to pass muster under the rational-basis test. See, *e. g., Vance* v. *Bradley*, 440 U. S. 93, 108 (1979). We are satisfied that the means that the State has chosen are "reasonably tailored to achieve [the State's legitimate] ends." *Lindsey, supra*, at 78. We therefore affirm the judgment of the Mississippi Supreme Court denying appellant's equal protection challenge to § 11–3–23.

It is so ordered.

JUSTICE STEVENS and JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE WHITE, with whom JUSTICE SCALIA joins, concurring in part.

I join Parts I and III of the Court's opinion but not Part II. I continue to believe that "the statute which gives us jurisdiction in this cause, 28 U. S. C. § 1257(3), prevents us from deciding federal constitutional claims raised here for the first time on review of state-court decisions. *Cardinale* v. *Louisiana*, 394 U. S. 437, 438–439 (1969)." *Illinois* v. *Gates*, 462 U. S. 213, 247 (1983) (WHITE, J., concurring in judgment). Thus, I disagree with the Court's analysis—under "prudential" standards—of appellant's preservation of its challenge to the punitive damages award here. *Ante*, at 79–80. Ultimately, because the majority properly declines to address claims which I believe are not within this Court's jurisdiction, I concur in Part II's result, but not its reasoning.

JUSTICE O'CONNOR, with whom JUSTICE SCALIA joins, concurring in part and concurring in the judgment.

I do not agree with the Court's analysis of our jurisdiction over appellant's federal due process claim. I therefore do not join Part II or footnote 1 of the Court's opinion. I join the remainder of the opinion, and I agree with the analysis of Part II insofar as claims under the Excessive Fines Clause and Contract Clause are concerned. Moreover, for the reasons given below, I ultimately concur in the Court's judgment with respect to the due process claim as well.

In its brief on appeal to the Mississippi Supreme Court, appellant expressly invoked the Due Process Clause of the Fourteenth Amendment and argued that Mississippi law chilled its fundamental right of access to the courts by authorizing unlimited punitive damages. App. to Juris. Statement 135a. The Court does not acknowledge this argument in its discussion of why the due process claim was not raised and passed upon below, but only notes that appellant did not present a due process argument clearly in its petition for rehearing. *Ante*, at 77. The Court suggests that it need not consider the due process argument raised in appellant's brief to the Mississippi Supreme Court because it is "distinct from the attack on the size of the particular award that appellant has waged before this Court." *Ante*, at 75, n. 1. Standing alone, this observation is insufficient to deprive this Court of jurisdiction over appellant's due process claim. "Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Dewey* v. *Des Moines*, 173 U. S. 193, 197–198 (1899). See *Illinois* v. *Gates*, 462 U. S. 213, 248 (1983) (WHITE, J., concurring in judgment).

Accordingly, the Court should examine the federal due process argument that appellant makes in this Court to determine whether it is "only an enlargement" of the due process argument it raised below. See *Dewey, supra,* at 197. In its principal brief in this Court, appellant contends that the Mississippi Supreme Court changed its standard for judging when an insurer may be liable for punitive damages and applied the new standard retroactively to this case. Appellant explains that it therefore had no advance notice of what conduct could render it liable for punitive damages. Citing cases in which this Court has struck down criminal statutes as void for vagueness, *e. g., Roberts* v. *United States Jaycees,* 468 U. S. 609 (1984); *Giaccio* v. *Pennsylvania,* 382 U. S. 399 (1966), appellant maintains that this violated the Due Process Clause. Brief for Appellant 40–43. Then, in a supplemental brief filed after argument with the Court's leave, appellant expands the due process argument pressed below and mounts a more general attack on permitting juries to impose unlimited punitive damages on an ad hoc basis. Postargument Brief for Appellant 4–10.

Appellant has touched on a due process issue that I think is worthy of the Court's attention in an appropriate case. Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause.

Punitive damages are awarded not to compensate for injury but, rather, "to punish reprehensible conduct and to deter its future occurrence." *Gertz* v. *Welch, Inc.,* 418 U. S. 323, 350 (1974). Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount. Hence, "the impact of these windfall recoveries is unpredictable and potentially substantial." *Electrical Workers* v. *Foust,* 442 U. S. 42, 50 (1979). For these reasons, the Court has forbidden the award of punitive damages in defamation suits brought by private plaintiffs, *Gertz*, *supra*, at 349–350, and in unfair representation suits brought against unions under the Railway Labor Act, *Electrical Workers*, *supra*, at 52. For similar reasons, the Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits.

Under Mississippi law, the jury may award punitive damages for any common law tort committed with a certain mental state, that is, "for a willful and intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong." 483 So. 2d 254, 269 (Miss. 1985) (opinion below). Although this standard may describe the required mental state with sufficient precision, the amount of the penalty that may ensue is left completely indeterminate. As the Mississippi Supreme Court said, "the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury." *Id.*, at 278. This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process. The Court has recognized that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *United States* v. *Batchelder*, 442 U. S. 114, 123 (1979). Nothing in Mississippi law warned appellant that by committing a tort that caused $20,000 of actual damages, it could expect to incur a $1.6 million punitive damages award.

This due process question, serious as it is, should not be decided today. The argument was not appellant's principal submission to this Court. The analysis in the briefs and the discussion at oral argument were correspondingly abbreviated. Although the Court could assert jurisdiction over the due process question on the theory that the argument made here was a "mere enlargement" of the due process argument raised below, it would not be prudent to do so. Accordingly, I concur in the Court's judgment on this question and would leave for another day the consideration of these issues.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join Part I (except for footnote 1) and Part III of the opinion of the Court, and concur in its judgment. As to Part II, I agree with JUSTICE WHITE that the question of our entertaining the issues there discussed should be resolved as a matter of law, and not of discretion, and I therefore join his opinion. The Court having chosen not to follow that course, I agree with JUSTICE O'CONNOR regarding the basis on which our discretion should be exercised concerning the due process claim, and therefore join her opinion.

JUSTICE BLACKMUN, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion, for I agree that the Court should refrain from addressing appellant's challenge to the punitive damages awarded against it. I also agree with the Court's conclusion that appellant's challenge to Mississippi's "penalty statute," Miss. Code Ann. § 11–3–23 (Supp. 1987), is properly before the Court under its appellate jurisdiction. See 28 U. S. C. § 1257(2). Nonetheless, because I conclude that the statute cannot survive scrutiny under the Equal Protection Clause of the Fourteenth Amendment, I dissent from the Court's conclusion to the contrary.

Section 11–3–23 " 'is in the nature of a penalty, or a condition of appeal.' " *Pearce* v. *Ford Motor Co.*, 235 So. 2d 281, 283 (Miss. 1970), quoting *Meek* v. *Alexander*, 137 Miss. 117, 121, 102 So. 69, 70 (1924). Not all unsuccessful appellants, however, are subject to its penalizing effect. The statute imposes lump-sum "damages," calculated at 15% of the value of the underlying judgment, on an appellant who unsuccessfully appeals to the Mississippi Supreme Court a money judgment or possessory action.[1] Although the penalty applies to both the defendant and the prevailing but unsatisfied plaintiff who unsuccessfully appeals, it does *not* apply to the plaintiff who unsuccessfully appeals an *adverse* judgment or to the unsuccessful cross-appellant.

There can be little doubt that this damages assessment burdens the statutory right of a litigant to appeal a money judgment. The statute makes it substantially more expensive to exercise the right if the judgment is ultimately affirmed, and it thereby obviously creates a disincentive to appeal.[2] The Court concludes that "the means chosen in § 11–3–23 are reasonably related to the achievement of the State's objectives of discouraging frivolous appeals, compensating appellees for the intangible costs of litigation, and conserving judicial resources." *Ante*, at 85. In my view, the 15% automatic penalty provision is not at all "reasonably related" to any of these interests.[3] To the contrary, the relationship of the statutory classification of a money-judgment appellant to the asserted governmental goals "is so attenuated as to render the distinction arbitrary [and] irrational." *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 446 (1985).

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[1] Mississippi does not have an intermediate appellate court. Appeals are taken directly from the State's 40 trial courts to the Mississippi Supreme Court, which has appellate jurisdiction over all matters originating in any of the trial courts, as well as those coming to the trial courts from numerous administrative agencies. See Brief for Mississippi Trial Lawyers Assn. as *Amicus Curiae* 4–5, and n. 4. Thus, "[e]very losing litigant is given an automatic right of appeal" to the Mississippi Supreme Court. *Walters* v. *Inexco Oil Co.*, 440 So. 2d 268, 275 (Miss. 1983). That tribunal has observed that this "unfettered automatic right of appeal brings its own evils." *Ibid.*

[2] The Court asserts that the 15% penalty is "a relatively modest additional assessment," *ante*, at 84, when compared to the Oregon double-bond requirement for a defendant tenant, which the Court struck down in *Lindsey* v. *Normet*, 405 U. S. 56 (1972). This assertion is facile. Pursuant to § 11–3–23, the Mississippi Supreme Court imposed a mandatory $243,000 penalty against appellant in the instant case; this was in addition to extraordinary punitive damages. It is difficult to see the modesty in this imposition.

It is true that the Oregon statute at issue in *Lindsey* was more burdensome on the right to appeal in the sense that, by requiring that the bond be posted before an appeal was taken, it effectively foreclosed appeals to indigent defendants. See 405 U. S., at 79. But surely a penalty need not *foreclose* an appeal before it is recognized as burdensome. Cf. *ibid.* (disapproving the Oregon scheme because it raises the stakes of appealing an adverse judgment).

There is no rational relationship between the statute and the State's asserted desire to compensate a prevailing appellee for "having endured the slings and arrows of successful appellate litigation," *Walters* v. *Inexco Oil Co.*, 440 So. 2d 268, 274–275 (Miss. 1983), whether the costs of that litigation are measured in economic or noneconomic terms. There is no reasonable justification for compensating only plaintiffs who prevail against an appeal. Defendants who have successfully defended in trial court against suits seeking money damages and who are subjected to appeals that prove unsuccessful are similarly burdened by the added emotional and financial costs of the appellate process. Yet, under the statute, they receive no "compensation" because the penalty is not imposed on nonprevailing plaintiffs who unsuccessfully appeal. The statute arbitrarily discriminates against defendant-appellants of money judgments, and the State offers no justification for the distinction so drawn.

Not surprisingly, then, the Court makes no attempt to justify § 11–3–23 based upon the "compensation" objective, despite its reference to that state interest. Instead, it upholds the penalty statute as reasonably related to Mississippi's interest in discouraging frivolous appeals and thereby protecting the Mississippi Supreme Court "from being required to spend its time and energy and resources on appeals thoughtlessly taken." *Walters* v. *Inexco Oil Co.*, 440 So. 2d, at 275. See *ante*, at 81–82. In *Lindsey* v. *Normet*, 405 U. S. 56

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[3] Because I conclude that § 11–3–23 is not reasonably related to the state interests advanced in its defense, I need not address whether those interests are "legitimate" for purposes of equal protection analysis.

(1972), the Court explained that a State might adopt "reasonable procedural provisions . . . to discourage patently insubstantial appeals, if these rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied." *Id.*, at 78. But § 11–3–23 does not meet this standard. The penalty is neither applied in a uniform and nondiscriminatory manner, nor reasonably tailored to discourage "patently insubstantial appeals."

Section 11–3–23 does not permit the Mississippi Supreme Court to determine whether an appeal is frivolous; the 15% penalty is imposed on certain unsuccessful appellants whenever the judgment is affirmed, regardless of the substantial merit of the appellant's case. Thus, even if, as in this very case, a money judgment is affirmed by a narrow 5–4 majority of the Supreme Court, the assessment automatically is made. Such a provision obviously sweeps substantial appeals as well as frivolous appeals within its deterrent net.[4]

The claim that § 11–3–23 operates to screen out frivolous appeals is no more persuasive than was the same claim advanced in *Lindsey* in support of the Oregon double-bond requirement. This Court found the argument "unpersuasive" in *Lindsey* because the Oregon requirement "bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." 405 U. S., at 78. Similarly, § 11–3–23 not only discourages nonfrivolous appeals by those who would avoid the risk of additional damages, but also allows meritless appeals by those who can afford to assume that risk. More strikingly, the statute allows an entirely frivolous appeal by a nonprevailing plaintiff without the incursion of *any* risk of an appeal penalty. The Court provides no support for its conclusory assertion that Mississippi rationally concluded that the group of litigants susceptible to the penalty are those "most likely to be deterred from bringing meritless claims." *Ante,* at 84.

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[4] The unnecessarily broad sweep of § 11–3–23 is illuminated by comparison to Mississippi Supreme Court Rule 38, adopted July 6, 1987, and effective January 1, 1988, which provides for sanctions for the taking of a frivolous appeal in any civil case to which § 11–3–23 does not apply. It clearly reflects Mississippi's recognition that frivolous appeals can be specifically identified, and further demonstrates the irrationality of distinguishing between appeals taken from money judgments and other appeals.

At bottom, the majority's reasoning in sustaining Mississippi's mandatory penalty statute amounts to an assessment that § 11–3–23 applies to a larger group of appellants and burdens their right to appeal less heavily than the statute struck down by the Court on equal protection grounds in *Lindsey.* See *ante,* at 83–85. But *Lindsey* is not the benchmark by which we measure the constitutionality of a discriminatory state statute burdening the right to appeal. Each such statute must be justified by reference to the governmental objectives it purportedly seeks to further. Mississippi has failed to demonstrate that § 11–3–23 is rationally related to its stated goals. The discrimination against appellants from money judgments is arbitrary and irrational. Accordingly, the judgment of the Mississippi Supreme Court denying appellant's equal protection challenge to § 11–3–23 should be reversed.

I dissent.

PATRICK *v.* BURGET ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-1145. Argued February 22, 1988—Decided May 16, 1988

Petitioner, an Astoria, Oregon, surgeon, declined an invitation by respondents to join them as a partner in the Astoria Clinic, and instead began an independent practice in competition with the Clinic. Thereafter, petitioner experienced difficulties in his professional dealings with Clinic physicians, culminating in respondents' initiation of, and participation in, peer-review proceedings to terminate petitioner's privileges at Astoria's only hospital (a majority of whose staff members were employees or partners of the Clinic), on the ground that his care of his patients was below the hospital's standards. Petitioner filed suit in Federal District Court, alleging that respondents had violated §§ 1 and 2 of the Sherman Act by initiating and participating in the peer-review proceedings in order to reduce competition from petitioner rather than to improve patient care. Ultimately, the court entered a judgment against respondents, but the Court of Appeals reversed on the ground that respondents' conduct was immune from antitrust scrutiny under the state-action doctrine of *Parker* v. *Brown*, 317 U. S. 341, and its progeny, because Oregon has articulated a policy in favor of peer review and actively supervises the peer-review process.

Held: The state-action doctrine does not protect Oregon physicians from federal antitrust liability for their activities on hospital peer-review committees. The "active supervision" prong of the test used to determine whether private parties may claim state-action immunity requires that state officials have and exercise power to review such parties' particular anticompetitive acts and disapprove those that fail to accord with state policy. This requirement is not satisfied here, since there has been no showing that the State Health Division, the State Board of Medical Examiners, or the state judiciary reviews—or even could review—private decisions regarding hospital privileges to determine whether such decisions comport with state regulatory policy and to correct abuses. The policy argument that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and actively in peer-review proceedings essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to Congress. Pp. 99–106.

800 F. 2d 1498, reversed.

MARSHALL, J., delivered the opinion for the Court, in which all other Members joined, except BLACKMUN, J., who took no part in the consideration or decision of the case.

Barbee B. Lyon argued the cause for petitioner. With him on the brief was *Don H. Marmaduke*.

Thomas M. Triplett argued the cause and filed a brief for respondents.*

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented in this case is whether the state-action doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943), protects physicians in the State of Oregon from federal antitrust liability for their activities on hospital peer-review committees.

I

Astoria, Oregon, where the events giving rise to this lawsuit took place, is a city of approximately 10,000 people

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried, Assistant Attorney General Rule, Deputy Solicitor General Cohen, Deputy Assistant Attorney General Starling, Roy T. Englert, Jr., Robert B. Nicholson, Laura Heiser,* and *Robert D. Paul;* for the American Psychological Association by *Donald N. Bersoff* and *David W. Ogden;* and for the Association of American Physicians & Surgeons, Inc., et al. by *Russell Iungerich* and *Kent Masterson Brown.*

Briefs of *amici curiae* urging affirmance were filed for the American Medical Association et al. by *Rex E. Lee, Carter G. Phillips, Jack R. Bierig, Douglas R. Carlson, Linda A. Tomaselli, Harold J. Bressler, Raymond F. Mensing, Jr.,* and *Joseph Onek;* and for the Federation of State Medical Boards of the United States, Inc., by *Robert C. Bass, Jr.*

Briefs of *amicus curiae* were filed for the Board of Medical Quality Assurance of the State of California et al. by *Ellis J. Horvitz, Peter Abrahams, James E. Ludlam,* and *David E. Willett;* and for the Central and South West Corporation by *Jeffrey H. Howard* and *Ferd. C. Meyer, Jr.*

located in the northwest corner of the State. The only hospital in Astoria is the Columbia Memorial Hospital (CMH). Astoria also is the home of a private group-medical practice called the Astoria Clinic. At all times relevant to this case, a majority of the staff members at the CMH were employees or partners of the Astoria Clinic.

Petitioner Timothy Patrick is a general and vascular surgeon. He became an employee of the Astoria Clinic and a member of the CMH's medical staff in 1972. One year later, the partners of the Clinic, who are the respondents in this case,[1] invited petitioner to become a partner of the Clinic. Petitioner declined this offer and instead began an independent practice in competition with the surgical practice of the Clinic. Petitioner continued to serve on the medical staff of the CMH.

After petitioner established his independent practice, the physicians associated with the Astoria Clinic consistently refused to have professional dealings with him. Petitioner received virtually no referrals from physicians at the Clinic, even though the Clinic at times did not have a general surgeon on its staff. Rather than refer surgery patients to petitioner, Clinic doctors referred them to surgeons located as far as 50 miles from Astoria. In addition, Clinic physicians showed reluctance to assist petitioner with his own patients. Clinic doctors often declined to give consultations, and Clinic surgeons refused to provide backup coverage for patients under petitioner's care. At the same time, Clinic physicians repeatedly criticized petitioner for failing to obtain outside consultations and adequate backup coverage.

In 1979, respondent Gary Boelling, a partner at the Clinic, complained to the executive committee of the CMH's medical staff about an incident in which petitioner had left a patient in the care of a recently hired associate, who then left the patient unattended. The executive committee decided to refer this complaint, along with information about other cases handled by petitioner, to the State Board of Medical Examiners (BOME). Respondent Franklin Russell, another partner at the Clinic, chaired the committee of the BOME that investigated these matters. The members of the BOME committee criticized petitioner's medical practices to the full BOME, which then issued a letter of reprimand that had been drafted by Russell. The BOME retracted this letter in its entirety after petitioner sought judicial review of the BOME proceedings.

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[1] Petitioner originally named all of the partners of the Astoria Clinic as defendants. One partner, however, was dismissed from the suit at the close of petitioner's case at trial.

Two years later, at the request of respondent Richard Harris, a Clinic surgeon, the executive committee of the CMH's medical staff initiated a review of petitioner's hospital privileges. The committee voted to recommend the termination of petitioner's privileges on the ground that petitioner's care of his patients was below the standards of the hospital. Petitioner demanded a hearing, as provided by hospital bylaws, and a five-member ad hoc committee, chaired by respondent Boelling, heard the charges and defense. Petitioner requested that the members of the committee testify as to their personal bias against him, but they refused to accommodate this request. Before the committee rendered its decision, petitioner resigned from the hospital staff rather than risk termination.[2]

During the course of the hospital peer-review proceedings, petitioner filed this lawsuit in the United States District Court for the District of Oregon. Petitioner alleged that the partners of the Astoria Clinic had violated §§ 1 and 2 of the Sherman Act, ch. 647, 26 Stat. 209, 15 U. S. C. §§ 1, 2. Specifically, petitioner contended that the Clinic partners had initiated and participated in the hospital peer-review proceedings to reduce competition from petitioner rather than to improve patient care. Respondents denied this assertion, and the District Court submitted the dispute to the jury with instructions that it could rule in favor of petitioner only if it found that respondents' conduct was the result of a specific intent to injure or destroy competition.

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[2] The court below did not address any issues arising from petitioner's decision to resign from the hospital staff prior to the ad hoc committee's determination, and respondents did not raise this matter in their response to the petition for certiorari. Accordingly, we do not address the significance, if any, of petitioner's resignation.

The jury returned a verdict against respondents Russell, Boelling, and Harris on the § 1 claim and against all of the respondents on the § 2 claim. It awarded damages of $650,000 on the two antitrust claims taken together. The District Court, as required by law, see 15 U. S. C. § 15(a), 38 Stat. 731, trebled the antitrust damages.

The Court of Appeals for the Ninth Circuit reversed. 800 F. 2d 1498 (1986). It found that there was substantial evidence that respondents had acted in bad faith in the peer-review process.[3] The court held, however, that even if respondents had used the peer-review process to disadvantage a competitor rather than to improve patient care, their conduct in the peer-review proceedings was immune from antitrust scrutiny. The court reasoned that the peer-review activities of physicians in Oregon fall within the state-action exemption from antitrust liability because Oregon has articulated a policy in favor of peer review and actively supervises the peer-review process.[4] The court therefore reversed the judgment of the District Court as to petitioner's antitrust claims.

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[3] Viewing the evidence in the light most favorable to petitioner, as appropriate in light of the verdicts rendered by the jury, the Court of Appeals characterized respondents' conduct as "shabby, unprincipled and unprofessional." 800 F. 2d, at 1509.

[4] The Court of Appeals also determined that respondent Russell's activities as a member of the BOME likewise were immune from antitrust liability under the state-action doctrine. As we read the petition for writ of certiorari in this case, petitioner has declined to challenge this holding of the Court of Appeals. Indeed, petitioner asserts that this holding makes no difference to him because he suffered little or no damage from the BOME proceedings or respondent Russell's participation therein. Be-

We granted certiorari, 484 U. S. 814 (1987), to decide whether the state-action doctrine protects respondents' hospital peer-review activities from antitrust challenge.[5] We now reverse.

II

In *Parker* v. *Brown*, 317 U. S. 341 (1943), this Court considered whether the Sherman Act prohibits anticompetitive actions of a State. Petitioner in that case was a raisin producer who brought suit against the California Director of Agriculture to enjoin the enforcement of a marketing plan adopted under the State's Agricultural Prorate Act. That statute restricted competition among food producers in the State in order to stabilize prices and prevent economic waste. Relying on principles of federalism and state sovereignty, this Court refused to find in the Sherman Act "an unexpressed purpose to nullify a state's control over its officers and agents." *Id.*, at 351. The Sherman Act, the Court held, was not intended "to restrain state action or official action directed by a state." *Ibid.*

Although *Parker* involved a suit against a state official, the Court subsequently recognized that *Parker*'s federalism ra-

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cause petitioner has not brought this aspect of the Court of Appeals' decision before us, we express no view as to its correctness.

[5] The petition for certiorari also presented the question whether, assuming that respondent Russell's activities as a member of the BOME constitute state action and thus cannot directly form the basis for antitrust liability, evidence of those activities is admissible insofar as it indicates the presence of a nonimmune conspiracy in which Russell and others engaged. A close reading of the opinion below, however, reveals that the Court of Appeals did not address this question. This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court. See, *e. g.*, *Youakim* v. *Miller*, 425 U. S. 231, 234 (1976) *(per curiam)*. We see no reason to depart from this practice in the case at bar. Accordingly, we take no position on the evidentiary question raised by petitioner.

tionale demanded that the state-action exemption also apply in certain suits against private parties. See, *e. g.*, *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U. S. 48 (1985). If the Federal Government or a private litigant always could enforce the Sherman Act against private parties, then a State could not effectively implement a program restraining competition among them. The Court, however, also sought to ensure that private parties could claim state-action immunity from Sherman Act liability only when their anticompetitive acts were truly the product of state regulation. We accordingly established a rigorous two-pronged test to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws. See *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980). First, "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy.'" *Id.*, at 105, quoting *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 410 (1978) (opinion of BRENNAN, J.). Second, the anticompetitive conduct "must be 'actively supervised' by the State itself." *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, *supra*, at 105, quoting *Lafayette* v. *Louisiana Power & Light Co.*, *supra*, at 410 (opinion of BRENNAN, J.). Only if an anticompetitive act of a private party meets both of these requirements is it fairly attributable to the State.

In this case, we need not consider the "clear articulation" prong of the *Midcal* test, because the "active supervision" requirement is not satisfied. The active supervision requirement stems from the recognition that "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." *Hallie* v. *Eau Claire*, 471 U. S. 34, 47 (1985); see *id.*, at 45 ("A private party . . . may be presumed to be acting primarily on his or its own behalf"). The requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. *Id.*, at 46–47. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct. Cf. *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, *supra*, at 51 (noting that state public service commissions "have and exercise ultimate authority and control over all intrastate rates"); *Parker* v. *Brown*, *supra*, at 352 (stressing that a marketing plan proposed by raisin growers could not take effect unless approved by a state board). The mere presence of some state involvement or monitoring does not suffice. See *324 Liquor Corp.* v. *Duffy*, 479 U. S. 335, 345, n. 7 (1987) (holding that certain forms of state scrutiny of a restraint established by a private party did not constitute active supervision because they did not "exer[t] any significant control over" the terms of the restraint). The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Respondents in this case contend that the State of Oregon actively supervises the peer-review process through the State Health Division, the BOME, and the state judicial system. The Court of Appeals, in finding the active supervision requirement satisfied, also relied primarily on the powers and responsibilities of these state actors. Neither the Court of Appeals nor respondents, however, have succeeded in showing that any of these actors reviews—or even could review—private decisions regarding hospital privileges to determine whether such decisions comport with state regulatory policy and to correct abuses.

Oregon's Health Division has general supervisory powers over "matters relating to the preservation of life and health," Ore. Rev. Stat. § 431.110(1) (1987), including the licensing of hospitals, see § 441.025, and the enforcement of health laws, see §§ 431.120(1), 431.150, 431.155(1). Hospitals in Oregon are under a statutory obligation to establish peer-review procedures and to review those procedures on a regular basis. See §§ 441.055(3)(c), (d). The State Health Division, exercising its enforcement powers, may initiate judicial proceedings against any hospital violating this law. See §§ 431.150, 431.155. In addition, the Health Division may deny, suspend, or revoke a hospital's license for failure to comply with the statutory requirement. See § 441.030(2). Oregon law specifies no other ways in which the Health Division may supervise the peer-review process.

This statutory scheme does not establish a state program of active supervision over peer-review decisions. The Health Division's statutory authority over peer review relates only to a hospital's procedures;[6] that authority does not encompass the actual decisions made by hospital peer-review committees. The restraint challenged in this case (and in most cases of its kind) consists not in the procedures used to terminate hospital privileges, but in the termination of privileges itself. The State does not actively supervise this restraint unless a state official has and exercises ultimate authority over private privilege determinations. Oregon law does not give the Health Division this authority: under the statutory scheme, the Health Division has no power to review private peer-review decisions and overturn a decision that fails to accord with state policy. Thus, the activities of the Health

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[6] Indeed, the statutory scheme indicates that the Health Division has only limited power over even a hospital's peer-review procedures. The statute authorizes the Health Division to force a hospital to comply with its obligation to establish and regularly review peer-review procedures, but the statute does not empower the Health Division to review the quality of the procedures that the hospital adopts.

Division under Oregon law cannot satisfy the active supervision requirement of the state-action doctrine.

Similarly, the BOME does not engage in active supervision over private peer-review decisions. The principal function of the BOME is to regulate the licensing of physicians in the State. As respondents note, Oregon hospitals are required by statute to notify the BOME promptly of a decision to terminate or restrict privileges. See Ore. Rev. Stat. § 441.820(1) (1987). Neither this statutory provision nor any other, however, indicates that the BOME has the power to disapprove private privilege decisions. The apparent purpose of the reporting requirement is to give the BOME an opportunity to determine whether additional action on its part, such as revocation of a physician's license, is warranted.[7] Certainly, respondents have not shown that the BOME in practice reviews privilege decisions or that it ever has asserted the authority to reverse them.

The only remaining alleged supervisory authority in this case is the state judiciary. Respondents claim, and the Court of Appeals agreed, that Oregon's courts directly review privilege-termination decisions and that this judicial review constitutes active state supervision. This Court has not previously considered whether state courts, acting in their judicial capacity, can adequately supervise private conduct for purposes of the state-action doctrine. All of our prior cases concerning state supervision over private parties have involved administrative agencies, see, *e. g.*, *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471

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[7] The statutory provision requiring hospitals to inform the BOME of a decision to terminate privileges is only one of several statutory reporting requirements involving the BOME. Oregon law also provides that hospitals and licensees shall report medically incompetent conduct to the BOME. See Ore. Rev Stat. § 677.415(2) (1987). Further, malpractice insurers must report all medical malpractice claims to the BOME. See § 743.770. All of these reporting requirements appear designed to ensure that the BOME will learn of instances of substandard medical care so that it can decide whether official action is warranted.

U. S. 48 (1985), or State Supreme Courts with agency-like responsibilities over the organized bar, see *Bates* v. *State Bar of Arizona,* 433 U. S. 350 (1977). This case, however, does not require us to decide the broad question whether judicial review of private conduct ever can constitute active supervision, because judicial review of privilege-termination decisions in Oregon, if such review exists at all, falls far short of satisfying the active supervision requirement.

As an initial matter, it is not clear that Oregon law affords any direct judicial review of private peer-review decisions. Oregon has no statute expressly providing for judicial review of privilege terminations. Moreover, we are aware of no case in which an Oregon court has held that judicial review of peer-review decisions is available. The two cases that respondents have cited certainly do not hold that a physician whose privileges have been terminated by a private hospital is entitled to judicial review. In each of these cases, the Oregon Supreme Court assumed, but expressly did not decide, that a complaining physician was entitled to the kind of review he requested. See *Straube* v. *Emanuel Lutheran Charity Board,* 287 Ore. 375, 383, 600 P. 2d 381, 386 (1979) ("We have assumed (but not decided) for the purpose of this case that plaintiff is entitled to 'fair procedure' as a common law right"); *Huffaker* v. *Bailey,* 273 Ore. 273, 275, 540 P. 2d 1398, 1399 (1975) ("In view of our conclusion that petitioner cannot prevail even assuming the case is properly before us, we find it unnecessary to decide these interesting questions [of reviewability]. Therefore, we assume, but do not decide, that the hospital's decisions are subject to review by mandamus . . .").

Moreover, the Oregon courts have indicated that even if they were to provide judicial review of hospital peer-review proceedings, the review would be of a very limited nature. The Oregon Supreme Court, in its most recent decision addressing this matter, stated that a court "should [not] decide the merits of plaintiff's dismissal" and that "[i]t would be unwise for a court to do more than to make sure that some sort of reasonable procedure was afforded and that there was evidence from which it could be found that plaintiff's conduct posed a threat to patient care." *Straube* v. *Emanuel Lutheran Charity Board*, *supra*, at 384, 600 P. 2d, at 386. This kind of review would fail to satisfy the state-action doctrine's requirement of active supervision. Under the standard suggested by the Oregon Supreme Court, a state court would not review the merits of a privilege termination decision to determine whether it accorded with state regulatory policy. Such constricted review does not convert the action of a private party in terminating a physician's privileges into the action of the State for purposes of the state-action doctrine.

Because we conclude that no state actor in Oregon actively supervises hospital peer-review decisions, we hold that the state-action doctrine does not protect the peer-review activities challenged in this case from application of the federal antitrust laws. In so holding, we are not unmindful of the policy argument that respondents and their *amici* have advanced for reaching the opposite conclusion. They contend that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and actively in peer-review proceedings. This argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch. To the extent that Congress has declined to exempt medical peer review from the reach of the antitrust laws,[8] peer review is immune from antitrust scrutiny only if the State effectively has made this conduct its own. The State of Oregon has not done so. Accordingly, we reverse the judgment of the Court of Appeals.

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[8] Congress in fact insulated certain medical peer-review activities from antitrust liability in the Health Care Quality Improvement Act of 1986, 42 U. S. C. § 11101 *et seq.* (1982 ed., Supp. IV). The Act, which was enacted well after the events at issue in this case and is not retroactive, essentially immunizes peer-review action from liability if the action was taken "in the reasonable belief that [it] was in the furtherance of quality health care." § 11112(a). The Act expressly provides that it does not change other "immunities under law," § 11115(a), including the state-action immunity, thus

It is so ordered.

JUSTICE BLACKMUN took no part in the consideration or decision of this case.

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allowing States to immunize peer-review action that does not meet the federal standard. In enacting this measure, Congress clearly noted and responded to the concern that the possibility of antitrust liability will discourage effective peer review. If physicians believe that the Act provides insufficient immunity to protect the peer-review process fully, they must take that matter up with Congress.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* COMMERCIAL OFFICE PRODUCTS CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 86–1696. Argued January 13, 1988—Decided May 16, 1988

Under § 706(e) of Title VII of the Civil Rights Act of 1964 (Act), a complainant must file a discrimination charge with the Equal Employment Opportunity Commission (EEOC) within 180 days of the occurrence of the alleged unlawful employment practice, or within 300 days if the proceedings are initially instituted with a state or local agency having "authority to grant or seek relief." Under § 706(c), no charge may be filed with the EEOC until 60 days have elapsed from the initial filing of the charge with an authorized state or local agency, unless that agency's proceedings "have been earlier terminated." This Court has held that, in light of § 706(c)'s deferral period, a charge must be filed with, or referred by the EEOC to, the state or local agency within 240 days of the alleged discriminatory event in order to ensure that it may be filed within § 706(e)'s extended 300-day limit, unless the state or local agency terminates its proceedings before 300 days. *Mohasco Corp.* v. *Silver*, 447 U. S. 807. The Colorado Civil Rights Division (CCRD) and the EEOC have entered into a worksharing agreement, which provides that each will process certain categories of charges and that the CCRD waives § 706(c)'s 60-day deferral period with respect to those charges processed by the EEOC but retains jurisdiction to act on such charges after the EEOC's proceedings conclude. Alleging that, 290 days earlier, respondent had discharged her because of her sex in violation of Title VII, Suanne Leerssen filed a charge with the EEOC, which undertook the initial charge processing pursuant to the worksharing agreement. The CCRD informed Leerssen that it had waived its right in this regard but retained jurisdiction under the agreement. Respondent refused to comply with the EEOC's administrative subpoena, and the District Court denied enforcement of the subpoena, on the ground that the EEOC lacked jurisdiction because the charge was not timely filed within § 706(e)'s 300-day period. The Court of Appeals agreed and therefore affirmed, although it rejected respondent's contention that the 300-day period was inapplicable because Leerssen had not filed the charge with the CCRD within the 180-day limitations period provided by state law.

Held: The judgment is reversed, and the case is remanded.

803 F. 2d 581, reversed and remanded.

JUSTICE MARSHALL delivered the opinion of the Court with respect to Parts I, II–A, and III, concluding that:

1. A state agency's decision to waive § 706(c)'s 60-day period, pursuant to a worksharing agreement with the EEOC, "terminates" the agency's proceedings within the meaning of § 706(c), so that the EEOC may immediately deem the charge filed and begin to process it. Respondent's contention, and the Court of Appeals' holding, that the CCRD did not "terminate" its proceedings because it retained jurisdiction to act on the EEOC's resolution of the charge must be rejected in favor of the EEOC's position that a state agency "terminates" its proceedings when it declares that it will not proceed, if it does so at all, for a specified interval of time, since the interpretation of ambiguous language in the Act by the EEOC, the agency having primary enforcement responsibility, is entitled to deference where it is reasonable. The reasonableness of the EEOC's interpretation of "terminate" in its statutory context is more than amply supported by the legislative history of Title VII's deferral provisions, the purposes of those provisions, and the language of other sections of the Act. Pp. 114–116.

2. A complainant who files a charge that is untimely under state law is nonetheless entitled to § 706(e)'s extended 300-day federal filing period. That section's "authority to grant or seek relief" phrase does not preclude this conclusion on the theory that a state or local agency lacks the requisite authority in the absence of a timely filing under state law, since the phrase refers merely to enabling legislation establishing such agencies, not to state limitations requirements. Rather, the reasoning of *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, is entirely apposite even though that case involved the filing provisions of the Age Discrimination in Employment Act, since those provisions are virtually *in haec verba* with the Title VII provisions at issue here. Thus, the failure to file a timely state-law claim does not automatically preclude application of Title VII's 300-day period, since the Act contains no express requirement of timely state filing, and such a requirement should not be imported in light of the Act's remedial purposes and the fact that laypersons, rather than lawyers, are expected to initiate the process and would be confused by an additional state-law filing requirement. Moreover, such a requirement would embroil the EEOC in complicated state-law issues which it has neither the time nor the expertise to determine. Thus, *Mohasco*'s 240-day filing rule applies in such cases. Pp. 122–125.

MARSHALL, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, and III, in which BREN-

NAN, WHITE, BLACKMUN, and O'CONNOR, JJ., joined, and an opinion with respect to Parts II–B and II–C, in which BRENNAN, WHITE, and BLACKMUN, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 125. STEVENS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 126. KENNEDY, J., took no part in the consideration or decision of the case.

Richard J. Lazarus argued the cause for petitioner. With him on the briefs were *Solicitor General Fried, Deputy Solicitor General Ayer, Charles A. Shanor, Gwendolyn Young Reams, Vella M. Fink*, and *Donna J. Brusoski.*

James L. Stone argued the cause for respondent. With him on the brief was *Brent T. Johnson.**

JUSTICE MARSHALL announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, and III, and an opinion with respect to Parts II–B and II–C, in which JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE BLACKMUN joined.

This case raises two questions regarding the time limits for filing charges of employment discrimination with the Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U. S. C. § 2000e *et seq.* The primary question presented is whether a state agency's decision to waive its exclusive 60-day period for initial processing of a discrimination charge, pursuant to a worksharing agreement with the EEOC, "terminates" the agency's proceedings within the meaning of § 706(c) of Title VII, 78 Stat. 260, as amended in 1972, 86 Stat. 104, 42 U. S. C. § 2000e–5(c), so that the EEOC immediately may deem the charge filed. In addition, we must decide whether a complainant who files a discrimination charge that is untimely under state law is nonetheless entitled to the extended 300-day federal filing period of § 706(e) of Title VII, 78 Stat. 260, as amended in 1972, 86 Stat. 105, 42 U. S. C. § 2000e–5(e).

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*A brief of *amici curiae* urging reversal was filed for the State of Colorado et al. by *Duane Woodard*, Attorney General of Colorado, *Charles B. Howe*, Deputy Attorney General, *Richard H. Forman*, Solicitor General, *Mary Ann F. Whiteside*, First Assistant Attorney General, *Joseph I. Lieberman*, Attorney General of Connecticut, *Frederick D. Cooke, Jr.*, Acting Corporation Counsel of the District of Columbia, *William L. Webster*, Attorney General of Missouri, *W. Cary Edwards*, Attorney General of New Jersey, *Robert Abrams*, Attorney General of New York, *Jim Mattox*, Attorney General of Texas, *Donald J. Hanaway*, Attorney General of Wisconsin, and *Joseph B. Meyer*, Attorney General of Wyoming.

Robert E. Williams, Douglas S. McDowell, and *Jeffrey A. Norris* filed a brief for the Equal Employment Advisory Council as *amicus curiae.*

I

The time limit provisions of Title VII as interpreted by this Court establish the following procedures for filing discrimination charges with the EEOC. As a general rule, a complainant must file a discrimination charge with the EEOC within 180 days of the occurrence of the alleged unlawful employment practice. § 706(e), 42 U. S. C. § 2000e–5(e).[1] If a complainant initially institutes proceedings with a state or local agency with authority to grant or seek relief from the practice charged, the time limit for filing with the EEOC is extended to 300 days. *Ibid.*

In order to give States and localities an opportunity to combat discrimination free from premature federal intervention, the Act provides that no charge may be filed with the EEOC until 60 days have elapsed from initial filing of the charge with an authorized state or local agency, unless that agency's proceedings "have been earlier terminated." § 706(c), 42 U. S. C. § 2000e–5(c).[2] The EEOC's referral of a charge initially filed with the EEOC to the appropriate state or local agency properly institutes the agency's proceedings within the meaning of the Act, and the EEOC may hold the charge in "'suspended animation'" during the agency's 60-day period of exclusive jurisdiction. *Love* v. *Pullman Co.*, 404 U. S. 522, 525–526 (1972). In light of the 60-day deferral period, a complainant must file a charge with the appropriate state or local agency, or have the EEOC refer the charge to that agency, within 240 days of the alleged discriminatory event in order to ensure that it may be filed with the EEOC within the 300-day limit. See *Mohasco Corp.* v. *Silver*, 447 U. S. 807, 814, n. 16 (1980). If the complainant does not file within 240 days, the charge still may be timely filed with the

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[1] Section 706(e) provides:

"A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency." 86 Stat. 105, 42 U. S. C. § 2000e–5(e).

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[2] Section 706(c) provides:

"In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under [subsection (b)] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority." 86 Stat. 104, 42 U. S. C. § 2000e–5(c).

EEOC if the state or local agency terminates its proceedings before 300 days. See *ibid.*

The central question in this case is whether a state agency's waiver of the 60-day deferral period, pursuant to a worksharing agreement with the EEOC, constitutes a "termination" of its proceedings so as to permit the EEOC to deem a charge filed and to begin to process it immediately. This question is of substantial importance because the EEOC has used its statutory authority to enter into worksharing agreements with approximately three-quarters of the 109 state and local agencies authorized to enforce state and local employment discrimination laws. See § 709(b), 86 Stat. 107–108, 42 U. S. C. § 2000e–8(b) (authorizing the EEOC to "enter into written agreements" with state and local agencies to promote "effective enforcement" of the Act); Brief for Petitioner 4 (EEOC has entered into worksharing agreements with approximately 81 of 109 authorized state and local agencies).

These worksharing agreements typically provide that the state or local agency will process certain categories of charges and that the EEOC will process others, with the state or local agency waiving the 60-day deferral period in the latter instance. See, *e. g.*, Worksharing Agreement between Colorado Civil Rights Division and EEOC, App. to Pet. for Cert. 48a–49a. In either instance, the nonprocessing party to the worksharing agreement generally reserves the right to review the initial processing party's resolution of the charge and to investigate the charge further after the initial processing party has completed its proceedings. See, *e. g.*, *id.*, at 47a. Whether a waiver of the 60-day deferral period pursuant to a worksharing agreement constitutes a "termination" of a state or local agency's proceedings will determine not only when the EEOC may initiate its proceedings, but also whether an entire class of charges may be timely filed with the EEOC in the first instance.

The facts of the instant case concretely reflect what is at stake. On March 26, 1984, Suanne Leerssen filed a charge of discrimination with petitioner EEOC. She alleged that 290 days earlier, respondent Commercial Office Products Company had discharged her because of her sex in violation of Title VII. On March 30, the EEOC sent a copy of Leerssen's charge and a charge transmittal form to the Colorado Civil Rights Division (CCRD), which is authorized by the State to process charges of employment discrimination. The form stated that the EEOC would initially process the charge, pursuant to the worksharing agreement between the EEOC and the CCRD.

The CCRD returned the transmittal form to the EEOC, indicating on the form that the CCRD waived its right under Title VII to initially process the charge. On April 4, the CCRD sent a form letter to Leerssen explaining that it had waived its right to initial processing but stating that it still retained jurisdiction to act on the charge after the conclusion of the EEOC's proceedings. If the CCRD's waiver "terminated" its proceedings, then Leerssen's charge was filed with the EEOC just under the 300-day limit. If the waiver was not a "termination," however, then the charge was not timely filed with the EEOC because the 60-day deferral period did not expire until well after the 300-day limit.

The timeliness issue was raised in this case when the EEOC issued an administrative subpoena for information relevant to Leerssen's charge. Respondent refused to comply with the subpoena, maintaining that the EEOC lacked jurisdiction to investigate the charge because it was not timely filed. The EEOC commenced an action in the United States District Court for the District of Colorado seeking judicial enforcement of the subpoena. The District Court agreed with respondent and dismissed the EEOC's enforcement action, holding that the EEOC lacked jurisdiction over Leerssen's charge because it was not timely filed. See Civil Action No. 85–K–1385 (June 6, 1985), App. to Pet. for Cert. 23a.

The Court of Appeals for the Tenth Circuit affirmed. 803 F. 2d 581 (1986). As a threshold matter, the Court of Appeals rejected respondent's contention that the extended 300-day federal filing period was inapplicable because Leerssen had failed to file her charge with the CCRD within the State's own 180-day limitations period. *Id.*, at 585–586, and n. 3. The Court of Appeals agreed with the District Court, however, that Leerssen's charge was not filed within the 300-day period and that the EEOC therefore lacked jurisdiction over the charge. The Court of Appeals reasoned that a state agency "terminates" its proceedings within the meaning of § 706(c) only when it "completely surrenders its jurisdiction over a charge." *Id.*, at 587. Because the CCRD retained jurisdiction over Leerssen's charge, reserving the right to act at the conclusion of the EEOC's proceedings, it did not "finally and unequivocally terminate its authority" over the charge as the plain language of the statute required. *Id.*, at 590. The Court of Appeals expressly disagreed with the decision of the First Circuit in *Isaac* v. *Harvard University*, 769 F. 2d 817 (1985). The First Circuit had upheld the EEOC's view that a waiver of the right to initially process a charge constitutes a "termination," reasoning that the language of the Act is ambiguous and that the history and purposes of the Act support the EEOC's construction. Judge McKay dissented from the opinion of the Court of Appeals in this case, arguing that the EEOC should prevail for the reasons offered by the First Circuit.

We granted certiorari to resolve the conflict between the First and the Tenth Circuits, 482 U. S. 926 (1987), and we now reverse.

II

A

First and foremost, respondent defends the judgment of the Court of Appeals on the ground that the language of the statute unambiguously precludes the conclusion that the CCRD's waiver of the deferral period "terminated" its proceedings. According to respondent, "terminated" means only "'completed'" or "'ended.'" Brief for Respondent 14. Respondent urges that this definition is met only when a state agency, in the words of the Court of Appeals, "completely relinquish[es] its authority to act on the charge at that point *or in the future.*" 803 F. 2d, at 589, n. 13 (emphasis in original). Because the CCRD retained authority to reactivate its proceedings after the EEOC's resolution of the charge, respondent maintains that the CCRD did not "terminate" its proceedings within the meaning of the Act.

We cannot agree with respondent and the Court of Appeals that "terminate" must mean "to end for all time." Rather, we find persuasive the determination of the First Circuit that the definition of "termination" also includes "cessation in time." The First Circuit noted that this definition is included in both Webster's Third New International Dictionary 2359 (1976) (definition of "terminate") and Black's Law Dictionary 1319 (5th ed. 1979) (definition of "termination"). See *Isaac*, 769 F. 2d, at 820, 821, n. 5. Moreover, the First Circuit correctly observed that common usage of the words "terminate," "complete," or "end" often includes a time element, as in "ending negotiations despite the likely inevitability of their resumption" or "terminating work on the job-site knowing that it will resume the next day." *Id.*, at 821. These observations support the EEOC's contention that a state agency "terminates" its proceedings when it declares that it will not proceed, if it does so at all, for a specified interval of time.

To be sure, "terminate" also may bear the meaning proposed by respondent. Indeed, it may bear that meaning more naturally or more frequently in common usage. But it is axiomatic that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference. See *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 761 (1979). The reasonableness of the EEOC's interpretation of "terminate" in its statutory context is more than amply supported by the legislative history of the deferral provisions of Title VII, the purposes of those provisions, and the language of other sections of the Act, as described in detail below. Deference is therefore appropriate.

B

The legislative history of the deferral provisions of Title VII demonstrates that the EEOC's interpretation of § 706(c) is far more consistent with the purposes of the Act than respondent's contrary construction.

The deferral provisions of § 706 were enacted as part of a compromise forged during the course of one of the longest filibusters in the Senate's history. The bill that had passed the House provided for "deferral" to state and local enforcement efforts only in the sense that it directed the EEOC to enter into agreements with state agencies providing for the suspension of federal enforcement in certain circumstances. See H. R. 7152, 88th Cong., 2d Sess., § 708, 110 Cong. Rec. 2511–2512 (1964). The House bill further directed the EEOC to rescind any agreement with a state agency if the EEOC determined that the agency was no longer effectively exercising its power to combat discrimination. See *ibid.* In the Senate, this bill met with strenuous opposition on the ground that it placed the EEOC in the position of monitoring state enforcement efforts, granting States exclusive jurisdiction over local discrimination claims only upon the EEOC's determination that state efforts were effective. See, *e. g.*, *id.*, at 6449 (remarks of Sen. Dirksen). The bill's opponents voiced their concerns against the backdrop of the federal-state civil rights conflicts of the early 1960's, which no doubt intensified their fear of "the steady and deeper intrusion of the Federal power." See *id.*, at 8193 (remarks of Sen. Dirksen). These concerns were resolved by the "Dirksen-Mansfield substitute," which proposed the 60-day deferral period now in § 706(c) of the Act. See 110 Cong. Rec., at 11926–11935.

The proponents of the Dirksen-Mansfield substitute identified two goals of the deferral provisions, both of which fully support the EEOC's conclusion that States may, if they choose, waive the 60-day deferral period but retain jurisdiction over discrimination charges by entering into worksharing agreements with the EEOC. First, the proponents of the substitute deferral provisions explained that the 60-day deferral period was meant to give States a "reasonable opportunity to act under State law before the commencement of any Federal proceedings." *Id.*, at 12708 (remarks of Sen. Humphrey).[3] Nothing in the waiver provisions of the worksharing agreements impinges on the opportunity of the States to have an exclusive 60-day period for processing a discrimination charge. The waiver of that opportunity in specified instances is a voluntary choice made through individually negotiated agreements, not an imposition by the Federal Government. Indeed, eight worksharing States and the District of Columbia filed a brief as *amici* in this case, explaining their satisfaction with the operation of the waiver provisions of the worksharing agreements: "By clarifying primary responsibility for different categories of charges, worksharing agreements benefit both the EEOC and the states." Brief for Colorado et al. as *Amici Curiae* 5. Moreover, most worksharing agreements are flexible, permitting States to express interest in cases ordinarily waived under the agreement and to call upon the EEOC to refrain from assuming jurisdiction in such cases. See, *e. g.*, Worksharing Agreement Between CCRD and EEOC, App. to Pet. for Cert. 49a.

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[3] This point was made by other Senators and has been emphasized by this Court in our previous Title VII cases. See, *e. g.*, 110 Cong. Rec. 12688 (1964) (remarks of Sen. Saltonstall) (deferral provisions preserve "the opportunity and authority of the State and local governments to work out their own problems if they are willing to do so"); *id.*, at 14313 (remarks of Sen. Miller) (deferral provisions "giv[e] the States the opportunity to carry out their responsibilities first"); *Mohasco Corp.* v. *Silver*, 447 U. S. 807, 821 (1980) (deferral provisions "give state agencies an opportunity to redress the evil at which the federal legislation was aimed, and to avoid federal intervention unless its need was demonstrated"); *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 755 (1979) (deferral provisions "give state agencies a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary, resort to federal relief by victims of the discrimination"); *Love* v. *Pullman Co.*, 404 U. S. 522, 526 (1972) (deferral provisions "give state agencies a prior opportunity to consider discrimination complaints").

In contrast, respondent's argument that States should not be permitted to waive the deferral period because its creation reflected a congressional preference for state as opposed to federal enforcement is entirely at odds with the voluntarism stressed by the proponents of deferral. Congress clearly foresaw the possibility that States might decline to take advantage of the opportunity for enforcement afforded them by the deferral provisions. It therefore gave the EEOC the authority and responsibility to act when a State is "unable or unwilling" to provide relief. 110 Cong. Rec. 12725 (1964) (remarks of Sen. Humphrey). This Court, too, has recognized that Congress envisioned federal intervention when "States decline, for whatever reason, to take advantage of [their] opportunities" to settle grievances in "a voluntary and localized manner." *Oscar Mayer & Co.* v. *Evans*, 441 U. S., at 761. As counsel for the EEOC explained, deferral was meant to work as "a carrot, but not a stick," affording States an opportunity to act, but not penalizing their failure to do so other than by authorizing federal intervention. See Tr. of Oral Arg. 11. The waiver provisions of worksharing agreements are fully consistent with this goal.

In addition to providing States with an opportunity to forestall federal intervention, the deferral provisions were meant to promote "time economy and the expeditious handling of cases." 110 Cong. Rec. 9790 (1964) (remarks of Sen. Dirksen).[4] Respondent's proposed interpretation of § 706(c), adopted by the Court of Appeals, is irreconcilable with this purpose because it would result in extraordinary inefficiency without furthering any other goal of the Act. The EEOC would be required to wait 60 days before processing its share of discrimination claims under a worksharing agreement, even though both the EEOC and the relevant state or local agency agree that the State or locality will take no action during that period. Or, in an effort to avoid this pointless 60-day delay, state and local agencies could abandon their worksharing agreements with the EEOC and attempt to initially process all charges during the 60-day deferral period, a solution suggested by respondent. See Brief for Respondent 29–30. Such a solution would create an enormous backlog of discrimination charges in States and localities, preventing them from securing for their citizens the quick attention to discrimination claims afforded under worksharing agreements. Or, in another scenario proposed by respondent, see *id.*, at 29, n. 29, state or local agencies could rewrite their worksharing agreements with the EEOC to provide for "termination" of state or local proceedings in accordance with respondent's definition of that term—complete relinquishment of jurisdiction. This solution would prevent a pointless 60-day delay, but it would also preclude a State's reactivation of a discrimination charge upon the conclusion of federal proceedings.[5] Requiring that States completely

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[4] Respondent's contrary contention that the compromise provisions represented Congress' choice of deferral over efficiency, see Brief for Re-

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spondent 24, finds no support in the comments of Senator Dirksen, the chief architect of the compromise. His remarks make clear that he believed the compromise would promote efficiency while respecting state prerogatives. See, *e. g.*, 110 Cong. Rec. 8193 (1964) (deferral provisions will "assure individual complainants that they will have fair and expeditious consideration of their grievances").

[5] Reactivation of state proceedings after the conclusion of federal proceedings serves the useful function of permitting States to enforce their discrimination laws when these laws are more protective than Title VII. For example, Title VII does not give the EEOC jurisdiction to enforce the Act against employers of fewer than 15 employees or against bona fide private membership clubs. § 701(b), 42 U. S. C. § 2000e(b). Each year, the

relinquish authority over claims in order to avoid needless delay turns on its head the dual purposes of the deferral provisions: deference to the States and efficient processing of claims. As the *amici* States observe, such a requirement "frustrates the congressional intent to ensure state and local agencies the opportunity to employ their expertise to resolve discrimination complaints." Brief for Colorado et al. as *Amici Curiae* 1.

The most dramatic result of respondent's reading of the deferral provisions is the preclusion of any federal relief for an entire class of discrimination claims. All claims filed with the EEOC in worksharing States more than 240 but less than 300 days after the alleged discriminatory event, like Leerssen's claim in this case, will be rendered untimely because the 60-day deferral period will not expire within the 300-day filing limit.[6] Respondent's interpretation thus requires the 60-day deferral period—which was passed on behalf of state and local agencies—to render untimely a claim filed within the federal 300-day limit, despite the joint efforts of the EEOC and the state or local agency to avoid that result. As petitioner epigrammatically observes, a claim like Leerssen's that is filed with the EEOC within the last 60 days of the federal filing period is "too early until it is too late." Brief for Petitioner 25. This severe consequence, in conjunction with the pointless delay described above, demonstrates that respondent's interpretation of the language of § 706(c) leads to "absurd or futile results . . . 'plainly at variance with the policy of the legislation as a whole,'" which this Court need not and should not countenance. *United States* v. *American*

CCRD reactivates four to five charges in which the EEOC has determined after investigation that it lacks jurisdiction. Brief for Colorado et al. as *Amici Curiae* 7.

[6] All of the worksharing States, with the possible exception of Oklahoma and Tennessee, retain jurisdiction over a charge when they waive the 60-day deferral period. Brief for Petitioner 27, n. 24. Hence, none of these States "terminates" its proceedings by its waiver under respondent's interpretation of that term.

Trucking Assns., Inc., 310 U. S. 534, 543 (1940), quoting *Ozawa* v. *United States*, 260 U. S. 178, 194 (1922).

C

The EEOC's construction of § 706(c) also finds support in other, related sections of Title VII. These sections reinforce our reading of the legislative history that the 1964 Congress did not intend to preclude the operation of the waiver provisions of the worksharing agreements now widely in force.

Section 706(d) provides that when a member of the EEOC, rather than an individual complainant, files a discrimination charge in a State or locality with concurrent jurisdiction, "the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days . . . *unless a shorter period is requested*, to act." 42 U. S. C. § 2000e–5(d) (emphasis added). This language clearly permits state and local agencies to waive the 60-day deferral period and thus authorize the EEOC to take immediate action in cases arising under § 706(d). There is every reason to believe that Congress intended the same result in § 706(c), notwithstanding the variance in language. The legislative history of the deferral provisions reflects the legislators' understanding that the time limits of §§ 706(c) and (d) were the same. See, *e. g.*, 110 Cong. Rec. 12690 (1964) (remarks of Sen. Saltonstall); *id.*, at 15896 (remarks of Rep. Celler). Moreover, this Court already has recognized in *Love* v. *Pullman Co.*, 404 U. S., at 526–527, n. 6, that "the difference in wording between [the two sections] seems to be only a reflection of the different persons who initiate the charge." We concluded in *Love* that "[t]here is no reason to think" that Congress meant to permit the EEOC to hold a claim in abeyance during the deferral period under § 706(d), but not under § 706(c)—even though the former section expressly authorizes such action, and the latter section does not. *Ibid.* Similarly, in the instant case, there is no reason to think that Congress meant to make the deferral period waivable by States under § 706(d) when the EEOC files a claim, but mandatory under § 706(c) when an individual files a claim.

The EEOC's interpretation of § 706(c) also finds support in provisions of the Act calling for formal cooperation between the EEOC and state and local agencies. Section 705(g)(1) gives the EEOC the power "to cooperate with and, with their consent, utilize regional, State, local, and other agencies." 78 Stat. 258, 42 U. S. C. § 2000e–4(g)(1). Section 709(b) specifies that "[i]n furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies." 86 Stat. 108, 42 U. S. C. § 2000e–8(b). These sections clearly envision the establishment of some sort of worksharing agreements between the EEOC and state and local agencies, and they in no way preclude provisions designed to avoid unnecessary duplication of effort or waste of time. Because the EEOC's interpretation of the "termination" requirement of § 706(c) is necessary to give effect to such provisions in most of the existing worksharing agreements, we find that interpretation more consistent with the cooperative focus of the Act than respondent's contrary construction.

III

In the alternative, respondent argues in support of the result below that the extended 300-day federal filing period is inapplicable to this case because the complainant failed to file her discrimination charge with the CCRD within Colorado's 180-day limitations period. Respondent reasons that the extended 300-day filing period applies only when "the person aggrieved has initially instituted proceedings with a state or local agency with authority to grant or seek relief" from the practice charged, § 706(e), 42 U. S. C. § 2000e–5(e), and that in the absence of a timely filing under state law, a state agency lacks the requisite "authority to grant or seek relief." The Tenth Circuit rejected this argument below, as has every other Circuit to consider the question,[7] on the ground that the words "authority to grant or seek relief" refer merely to enabling legislation that establishes state or local agencies, not to state limitations requirements. We join the Circuits in concluding that state time limits for filing discrimination claims do not determine the applicable federal time limit.

Although respondent is correct that this Court's opinion in *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750 (1979), did not decide the precise issue we address today, see Brief for Respondent 36, the reasoning of *Oscar Mayer* provides significant guidance. In *Oscar Mayer*, we found in the Age Discrimination in Employment Act of 1967 (ADEA) context that a complainant's failure to file a claim within a state limitations period did not automatically render his federal claim untimely. We reasoned that the federal statute contained no express requirement of timely state filing, 441 U. S., at 759, and we declined to create such a requirement in light of the remedial purpose of the ADEA and our recognition that it is a "'statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.'" *Id.*, at 761, quoting *Love* v. *Pullman Co.*, *supra*, at 527. In the instant case, we decide the separate question whether under Title VII, untimely filing under state law automatically precludes the application of the extended 300-day federal filing period, but the reasoning of *Oscar Mayer* is entirely apposite. As we noted in *Oscar Mayer* itself, the filing provisions of the ADEA and Title VII are "virtually *in haec verba*," the former having been patterned after the latter. 441 U. S., at 755. Title VII, like the ADEA, contains no express reference to timeliness under state law. In addition, the policy considerations that militate against importing such a hurdle into the federal ADEA scheme are identical in the Title VII context: Title VII also is a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process.

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[7] See *Gilardi* v. *Schroeder*, 833 F. 2d 1226, 1230–1231 (CA7 1987); *Mennor* v. *Fort Hood National Bank*, 829 F. 2d 553, 556 (CA5 1987); *Maurya* v. *Peabody Coal Co.*, 823 F. 2d 933, 935 (CA6 1987), cert. denied, 484 U. S. 1067 (1988); *EEOC* v. *Shamrock Optical Co.*, 788 F. 2d 491, 493–494 (CA8 1986); *Thomas* v. *Florida Power & Light Co.*, 764 F. 2d 768, 771 (CA11 1985); *Howze* v. *Jones & Laughlin Steel Corp.* 750 F. 2d 1208, 1211 (CA3 1984).

The importation of state limitations periods into § 706(e) not only would confuse lay complainants, but also would embroil the EEOC in complicated issues of state law. In order for the EEOC to determine the timeliness of a charge filed with it between 180 and 300 days, it first would have to determine whether the charge had been timely filed under state law, because the answer to the latter question would establish which of the two federal limitations periods should apply. This state-law determination is not a simple matter. The EEOC first would have to determine whether a state limitations period was jurisdictional or nonjurisdictional. And if the limitations period was nonjurisdictional, like Colorado's in this case, the EEOC would have to decide whether it was waived or equitably tolled. The EEOC has neither the time nor the expertise to make such determinations under the varying laws of the many deferral States and has accordingly construed the extended 300-day period to be available regardless of the state filing. See 52 Fed. Reg. 10224 (1987). In contrast to the difficulties presented by respondent's argument, our broadly worded statement in *Mohasco Corp.* v. *Silver*, 447 U. S. 807 (1980), a case presenting a related issue regarding the application of the extended 300-day federal filing period, that a complainant "need only file his charge within 240 days of the alleged discriminatory employment practice in order to ensure that his federal rights will be preserved," *id.*, at 814, n. 16, establishes a rule that is both easily understood by complainants and easily administered by the EEOC. We reaffirm that rule today.

Because we find that the extended 300-day federal limitations period is applicable to this case and that the CCRD's waiver of the 60-day deferral period "terminated" its proceedings within that 300-day limit, we conclude that Leerssen's claim was timely filed under Title VII. We therefore reverse the decision of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE O'CONNOR concurring in part and concurring in the judgment.

I join Parts I and III of the Court's opinion. I also join Part II–A, in which the Court correctly concludes that in light of the statute's language, structure, and legislative history, sufficient ambiguity exists to warrant deference to the agency's construction of the word "terminated" in § 706(c). Indeed, deference is particularly appropriate on this type of technical issue of agency procedure. But while I agree with much of what the majority says in Parts II–B and II–C in indicating that the agency's construction is reasonable, in my view the majority goes too far by suggesting that the agency's position is the only one permissible. For example, the majority labels the respondent's position "absurd," *ante,* at 120, which of course implies that we would refuse to countenance an agency decision to adopt such an approach. See, *e. g., NLRB* v. *Food and Commercial Workers,* 484 U. S. 112, 123 (1987) (agency given deference only "as long as its interpretation is rational and consistent with the statute"); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 844 (1984) (agency regulations given deference "unless they are arbitrary, capricious, or manifestly contrary to the statute"). Any such implication is incorrect. As the dissent concisely points out, *post* at 126, and n. 1, the agency could quite reasonably conclude that the statutory language warrants giving the word "terminated" what the Court recognizes is its more natural reading, *ante*, at 115.

In short, I believe the result in this case is correct solely due to the traditional deference accorded the EEOC in interpretation of this statute. Because Parts II–B and II–C could be read to go beyond this view, I join only Parts I, II–A, and III of the Court's opinion and in the judgment.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

In my opinion the Court's decision is not faithful to the plain language of the statute,[1] to the legislative compromise

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[1] In a deferral State, § 706(c) of Title VII, 86 Stat. 104, 42 U. S. C. § 2000e–5(c), provides that "no charge may be filed . . . before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier *terminated.*" (Emphasis added.) The Court reasons that as used in § 706(c) "termination" might mean a temporary "cessation in time" and thus is sufficiently ambiguous to require deference to the EEOC's interpretation. *Ante*, at 115–116. I doubt that Congress chose the word "terminated" to convey something other than absolute finality, which the majority recognizes is the meaning the word bears "more naturally or more frequently in common usage." *Ante*, at 115. The context in which the word "terminate" is used may inform the reader that the termination being referred to is an ending at or for a particular time. This is true of the examples given by the majority. See *ibid.* In the phrase "terminating work on the job-site knowing that it will resume the next day," it is the words used after the word "terminating" that convey the promise of future events, not the word "terminating" itself. The context in which "terminate" is used in § 706(c), however, negates the possibility that future activity by the State was contemplated, because Congress provided that state proceedings must have been *earlier* terminated.

The majority seeks to construe the statute in a manner that preserves an opportunity for a State to reactivate its proceedings upon the conclusion of federal proceedings. Although such an advantage may be prudent, it is not conferred by the statute, and the failure to afford it does not "tur[n] on its head" the purposes of the statute. See *ante*, at 120. That the statute operates to prevent concurrent jurisdiction over claims filed over 240 days that made it possible to enact the Civil Rights Act of 1964,[2] or to our prior interpretation of the very provision the Court construes today.[3] Accordingly, I respectfully dissent.

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after the prohibited practice occurred does not frustrate congressional intent to protect state enforcement efforts. What is being denied is not state, but federal intervention.

[2] See *Mohasco Corp.* v. *Silver*, 447 U. S. 807, 819–822 (1980). Although it is perfectly clear that nothing in the legislative history contains any suggestion that complainants in deferral States were to be allowed to proceed with less diligence than those in nondeferral States (who must file within 180 days), the Court assumes that the entire class of claims filed after 240 days is entitled to specially favored treatment. See *ante*, at 120–121; *Moore* v. *Sunbeam Corp.*, 459 F. 2d 811, 822–826, 829–830 (CA7 1972).

[3] In *Mohasco, supra*, at 821, we stated:

"Congress chose to prohibit the filing of any federal charge until after state proceedings had been completed or until 60 days had passed, whichever came sooner."

McLAUGHLIN, SECRETARY OF LABOR *v.* RICHLAND SHOE CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86-1520. Argued February 24, 1988—Decided May 16, 1988

The Fair Labor Standards Act (FLSA) requires that a civil enforcement action be commenced within two years after the cause of action accrued, except that a cause of action arising out of a "willful" violation may be commenced within three years. In the Secretary of Labor's enforcement action based on respondent's alleged failure to pay overtime compensation required by the FLSA, the District Court rejected respondent's claim that the 2-year statute of limitations applied, finding the 3-year exception applicable under the standard of *Coleman* v. *Jiffy June Farms, Inc.*, 458 F. 2d 1139, whereby an action is "willful" if there is substantial evidence that the employer "knew or suspected that his actions might violate the FLSA"; *i. e.*, if he merely knew that the FLSA was "in the picture." Vacating the judgment against respondent and remanding, the Court of Appeals rejected the *Jiffy June* standard in favor of the test employed in *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111.

Held: The standard of willfulness adopted in *Thurston*—that the employer either knew or showed reckless disregard as to whether its conduct was prohibited by the FLSA—must be satisfied in order for the 3-year statute of limitations to apply. This standard represents a fair reading of the Act's plain language, since it comports with the general understanding that the word "willful" refers to conduct that is "voluntary," "deliberate," or "intentional," and not merely negligent. In contrast, the statute's plain language does not support the *Jiffy June* standard, which effectively limits the normal 2-year statute of limitations to employers who are unaware of the FLSA and its potential applicability, and thereby virtually obliterates the distinction between willful and nonwillful violations which Congress obviously intended to draw. Also rejected is the alternative, two-step standard espoused by the Secretary, whereby an FLSA violation would be deemed "willful" "if the employer, recognizing it might be covered by the FLSA, acted without a reasonable basis for believing that it was complying with the statute." This standard would permit a finding of willfulness to be based on nothing more than negligence, or, perhaps, on a completely good-faith but incorrect assumption that a pay plan complied with the FLSA in all respects, and thereby fails to give effect to the plain statutory language. Pp. 131–135.

799 F. 2d 80, affirmed.

STEVENS J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 135.

Deputy Solicitor General Ayer argued the cause for petitioner. With him on the briefs were *Solicitor General Fried*, *Richard G. Taranto*, *George R. Salem*, *Allen H. Feldman*, and *Mary-Helen Mautner*.

Leon Ehrlich argued the cause and filed a brief for respondent.*

JUSTICE STEVENS delivered the opinion of the Court.

The question presented concerns the meaning of the word "willful" as used in the statute of limitations applicable to civil actions to enforce the Fair Labor Standards Act (FLSA). The statute provides that such actions must be commenced within two years "except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 61 Stat. 88, 29 U. S. C. § 255(a).

I

Respondent, a manufacturer of shoes and boots, employed seven mechanics to maintain and repair its equipment. In 1984, the Secretary of Labor (Secretary) filed a complaint alleging that "in many work weeks" respondent had failed to pay those employees the overtime compensation required by the FLSA. As an affirmative defense, respondent pleaded the 2-year statute of limitations. The District Court found, however, that the 3-year exception applied because respondent's violations were willful, and entered judgment requiring

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**Robert E. Williams*, *Douglas S. McDowell*, and *Garen E. Dodge* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging affirmance.

respondent to pay a total of $11,084.26, plus interest, to the seven employees. *Donovan* v. *Richland Shoe Co.*, 623 F. Supp. 667 (ED Pa. 1985).

In resolving the question of willfulness, the District Court followed Fifth Circuit decisions that had developed the so-called *Jiffy June* standard. The District Court explained:

> "The Fifth Circuit has held that an action is willful when 'there is substantial evidence in the record to support a finding that the employer knew or suspected that his actions might violate the FLSA. Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture?' *Coleman* v. *Jiffy June Farms, Inc.*, 458 F. 2d 1139, 1142 (5th Cir.)[, cert. denied, 409 U. S. 948 (1972)].
>
> "This standard requires nothing more than that the employer has an awareness of the possible application of the FLSA. *Id.; Castillo* v. *Givens*, 704 F. 2d 181, 193 (5th Cir.)[, cert. denied, 464 U. S. 850 (1983)]. 'An employer acts willfully and subjects himself to the three year liability if he knows, or has reason to know, that his conduct is *governed* by the FLSA.' *Brennan* v. *Heard*, 491 F. 2d 1, 3 (5th Cir. 1974) (emphasis in original). *See also Donovan* v. *Sabine Irrigation Co., Inc.*, 695 F. 2d 190, 196 (5th Cir.)[, cert. denied, 463 U. S. 1207 (1983)]." 623 F. Supp., at 670–671.

On appeal respondent persuaded the Court of Appeals for the Third Circuit "that the *Jiffy June* standard is wrong because it is contrary to the plain meaning of the FLSA." *Brock* v. *Richland Shoe Co.*, 799 F. 2d 80, 82 (1986). Adopting the same test that we employed in *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 125–130 (1985), the Court of Appeals held that respondent had not committed a willful violation unless "it knew or *showed reckless disregard for the matter of whether* its conduct was prohibited by the FLSA." 799 F. 2d, at 83 (emphasis in original). Accordingly, it vacated the District Court's judgment and remanded the case for reconsideration under the proper standard.

The Secretary filed a petition for certiorari asking us to resolve the post-*Thurston* conflict among the Circuits concerning the meaning of the word "willful" in this statute.[1] The petition noted that the statute applies not only to actions to enforce the overtime and recordkeeping provisions of the FLSA, but also to the Equal Pay Act,[2] the Davis-Bacon Act,[3] the Walsh-Healey Act,[4] and the Age Discrimination in Employment Act (ADEA).[5] Somewhat surprisingly, the petition did not endorse the *Jiffy June* standard that the Secretary had relied on in the District Court and the Court of Appeals, but instead invited us to adopt an intermediate standard. We granted certiorari, 484 U. S. 813 (1987), and now affirm.

II

Because no limitations period was provided in the original 1938 enactment of the FLSA, civil actions brought thereunder were governed by state statutes of limitations. In the Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C. §§216, 251–262, however, as part of its response to this Court's expansive reading of the FLSA,[6] Congress enacted the 2-year statute to place a limit on employers' exposure to unanticipated contingent liabilities.[7] As originally enacted, the 2-year limitations period drew no distinction between willful and nonwillful violations.

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[1] Compare *Russo* v. *Trifari, Krussman & Fishel, Inc.*, 837 F. 2d 40, 45 (CA2 1988) (applying *Thurston* standard); *Peters* v. *Shreveport*, 818 F. 2d 1148, 1167–1168 (CA5 1987) (overruling *Jiffy June*, applying *Thurston*), cert. dism'd, 485 U. S. 930 (1988); and *Walton* v. *United Consumers Club, Inc.*, 786 F. 2d 303, 308–311 (CA7 1986) (applying *Thurston*), with *Brock* v. *Shirk*, 833 F. 2d 1326, 1329 (CA9 1987) (adhering to *Jiffy June*); *Crenshaw* v. *Quarles Drilling Corp.*, 798 F. 2d 1345, 1349–1350 (CA10 1986) (adhering to *Jiffy June*); *Donovan* v. *Bel-Loc Diner, Inc.*, 780 F. 2d 1113, 1117 (CA4 1985) (adhering to *Jiffy June*); *Secretary of Labor* v. *Daylight Dairy Products, Inc.*, 779 F. 2d 784, 789 (CA1 1985) (adhering to *Jiffy June*); and *Brock* v. *Georgia Southwestern College*, 765 F. 2d 1026, 1038–1039 (CA11 1985) (adhering to *Jiffy June;* no mention of *Thurston*).

[2] See 52 Stat. 1062, as amended, 29 U. S. C. § 206(d)(3).

[3] 46 Stat. 1494, as amended, 40 U. S. C. § 276(a) *et seq.*

[4] 49 Stat. 2036, as amended, 41 U. S. C. § 35 *et seq.* (1982 ed. and Supp. IV).

[5] See 81 Stat. 604, as amended, 29 U. S. C. § 626(e)(1).

In 1965, the Secretary proposed a number of amendments to expand the coverage of the FLSA, including a proposal to replace the 2-year statute of limitations with a 3-year statute. The proposal was not adopted, but in 1966, for reasons that are not explained in the legislative history, Congress enacted the 3-year exception for willful violations.[8]

The fact that Congress did not simply extend the limitations period to three years, but instead adopted a two-tiered statute of limitations, makes it obvious that Congress intended to draw a significant distinction between ordinary violations and willful violations. It is equally obvious to us that the *Jiffy June* standard of willfulness—a standard that merely requires that an employer knew that the FLSA "was in the picture"—virtually obliterates any distinction between willful and nonwillful violations. As we said in *Trans World Airlines, Inc.* v. *Thurston,* 469 U. S., at 128, "it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability." Under the *Jiffy June* standard, the normal 2-year statute of limitations would seem to apply only to ignorant employers, surely not a state of affairs intended by Congress.[9]

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[6] See *Lorillard* v. *Pons*, 434 U. S. 575, 581, n. 8 (1978).

[7] The Portal-to-Portal Act also made the award of liquidated damages discretionary rather than mandatory and authorized exemptions for certain types of wage plans. In this case, respondent contended that one of those exemptions—the exemption for "Belo" plans, see 29 U. S. C. § 207(f)—was applicable.

[8] Petitioner directs us to a memorandum placed in the Congressional Record by Senator Taft during a 1974 debate over amendments to the FLSA that did not alter the language at issue here. See Brief for Petitioner 32. The memorandum described the *Jiffy June* standard as the then-prevailing interpretation of § 255(a). See 120 Cong. Rec. 4710 (1974). Petitioner concludes that "[n]otwithstanding that explicit focus on the judicial construction of willfulness, Congress amended Section 255 without addressing the 'willful violation' standard of Section 255(a)." Brief for Petitioner 33. This passing reference to the then-prevailing standard is too slender a reed, we think, to support the inference petitioner would have us draw, namely, that Congress approved the *Jiffy June* standard in enacting the 1974 amendments by mentioning it as the current interpretation and failing to amend that reading.

In common usage the word "willful" is considered synonymous with such words as "voluntary," "deliberate," and "intentional." See Roget's International Thesaurus § 622.7, p. 479; § 653.9, p. 501 (4th ed. 1977). The word "willful" is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. The standard of willfulness that was adopted in *Thurston*—that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute—is surely a fair reading of the plain language of the Act.

The strongest argument supporting the *Jiffy June* standard is that it was widely used for a number of years.[10] The standard was not, however, consistently followed in all Circuits.[11] In view of the fact that even the Secretary now shares our opinion that it is not supported by the plain language of the statute, we readily reject it.[12]

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[9] The ease with which the *Jiffy June* standard can be met is exemplified in this case. As the District Court wrote:

"[T]he vice president and general manager of the defendant was aware that the FLSA existed and that it governed overtime systems such as that used for the Richland mechanics. . . . Thus, although Isenberg did not state that he thought that the system used was contrary to the provisions of the FLSA, he did state that he knew that the FLSA applied. I believe that this admission is sufficient to satisfy the liberal willfulness requirement of the FLSA." *Donovan* v. *Richland Shoe Co.*, 623 F. Supp. 667, 671 (ED Pa. 1985).

[10] See, *e. g., Coleman* v. *Jiffy June Farms, Inc.*, 458 F. 2d 1139, 1142 (CA5 1971), cert. denied, 409 U. S. 948 (1972); *Brennan* v. *Heard,* 491 F. 2d 1, 3 (CA5 1974); *Marshall* v. *Union Pacific Motor Freight Co.*, 650 F. 2d 1085, 1091–1093 (CA9 1981); *Marshall* v. *Erin Food Services, Inc.*, 672 F. 2d 229, 231 (CA1 1982); *Donovan* v. *Carls Drug Co., Inc.*, 703 F. 2d 650, 652–653 (CA2 1983); *EEOC* v. *Central Kansas Medical Center,* 705 F. 2d 1270, 1274–1275 (CA10 1983).

We also reject the intermediate alternative espoused by the Secretary for the first time in this Court. Relying on the opinion of the Court of Appeals for the District of Columbia Circuit in *Laffey* v. *Northwest Airlines, Inc.*, 185 U. S. App. D. C. 322, 352–354, 567 F. 2d 429, 461–462 (1976), cert. denied, 434 U. S. 1086 (1978), she argues that we should announce a two-step standard that would deem an FLSA violation willful "if the employer, recognizing it might be covered by the FLSA, acted without a reasonable basis for believing that it was complying with the statute." Brief for Petitioner 41. This proposal differs from *Jiffy June* because it would apparently make the issue in most cases turn on whether the employer sought legal advice concerning its pay practices.

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[11] See, *e. g., Hodgson* v. *Cactus Craft of Arizona*, 481 F. 2d 464, 467 (CA9 1973) (willful violation after two prior warnings and unkept promises of compliance); *Laffey* v. *Northwest Airlines, Inc.*, 185 U. S. App. D. C. 322, 352–355, 567 F. 2d 429, 459–462 (1976) (intermediate standard; see text following this footnote), cert. denied, 434 U. S. 1086 (1978); *Donovan* v. *KFC National Management Co.*, 682 F. 2d 603, 605 (CA6 1982) (voluntary conduct that employer knows might violate Act is willful).

[12] The Secretary's present opinion of the *Jiffy June* standard is expressed in her brief:

"As this Court found in *Thurston* (469 U. S. at 128), the 'in the picture' standard seems to give too little effect to Congress's express intent to create two tiers of liability in the FLSA limitations provision. Among employers eventually found to have violated the FLSA, it would seem that there are not many who did not know that the Act was 'in the picture.' It may be 'virtually impossible for an employer to show that he was unaware of the Act and its potential applicability' *(ibid.)*. In addition, the *Jiffy June* standard would impose a third year of liability even on those employers who firmly and reasonably (albeit wrongly) believe that their pay practices are lawful, a result that seems counter to the concerns expressed in the legislative process during the 89th Congress." Brief for Petitioner 39–40 (footnote omitted).

It would, however, permit a finding of willfulness to be based on nothing more than negligence, or, perhaps, on a completely good-faith but incorrect assumption that a pay plan complied with the FLSA in all respects. We believe the Secretary's new proposal, like the discredited *Jiffy June* standard, fails to give effect to the plain language of the statute of limitations.[13]

Ordinary violations of the FLSA are subject to the general 2-year statute of limitations. To obtain the benefit of the 3-year exception, the Secretary must prove that the employer's conduct was willful as that term is defined in both *Thurston* and this opinion.[14]

The judgment of the Court of Appeals is

Affirmed.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

The Court today imports into a limitations provision of the Fair Labor Standards Act (FLSA) the "knowing or reckless" definition of "willful" that we previously adopted in construing a liquidated damages provision of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.* See *Trans World*

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[13] We recognize that there is some language in *Trans World Airlines* v. *Thurston*, 469 U. S. 111 (1985), not necessary to our holding, that would seem to permit a finding of unreasonableness to suffice as proof of knowing or reckless disregard, and thus that would render petitioner's standard an appropriate statement of the law. See *id.*, at 126. Our decision today should clarify this point: If an employer acts reasonably in determining its legal obligation, its action cannot be deemed willful under either petitioner's test or under the standard we set forth. If an employer acts unreasonably, but not recklessly, in determining its legal obligation, then, although its action would be considered willful under petitioner's test, it should not be so considered under *Thurston* or the identical standard we approve today.

[14] Of course, we express no view as to whether, under the proper standard, respondent's violation was "willful." That determination is for the District Court to make on remand from the Court of Appeals.

Airlines, Inc. v. *Thurston,* 469 U. S. 111 (1985). In doing so, the Court departs from our traditional contextual approach to the definition of the term "willful," ignores significant differences between the relevant provisions of the two Acts, and fails to accommodate the remedial purpose of civil actions under the FLSA. For these reasons, I would accept the slightly more expansive definition of "willful" urged by the Secretary of Labor and adopted by the District of Columbia Circuit in *Laffey* v. *Northwest Airlines, Inc.*, 185 U. S. App. D. C. 322, 354–355, 567 F. 2d 429, 461–462 (1976), cert. denied, 434 U. S. 1086 (1978). Under this latter standard, a violation of the FLSA is "willful" and therefore subjects an employer to a 3-year rather than a 2-year statute of limitations if the employer knew that there was an appreciable possibility that it was covered by the Act and failed to take steps reasonably calculated to resolve the doubt.

I have no quarrel with the opinion of the Court to the extent that it rejects the "in the picture" standard of willfulness elaborated in *Coleman* v. *Jiffy June Farms, Inc.*, 458 F. 2d 1139, 1142 (CA5 1971), cert. denied, 409 U. S. 948 (1972). As the Court succinctly explains, by permitting a finding of willful violation every time an employer knew that the FLSA was "in the picture," the *Jiffy June* standard "virtually obliterates any distinction between willful and nonwillful violations." *Ante*, at 132–133. But the Court's focus on the shortcomings of the *Jiffy June* standard is disingenuous, because neither party in the instant case urged the adoption of that standard before this Court. Rather, the dispute in this case pits the *Thurston* "knowing or reckless" standard, adopted by the Third Circuit in this case and urged by respondent Richland Shoe, against the *Laffey* standard, adopted by the D. C. Circuit in an earlier case and urged by petitioner Secretary of Labor. The Court does not address this dispute until the penultimate page of its opinion, and its reasons for embracing the former standard over the latter are not convincing.

The Court seems to rely in part on "common usage" of the word "willful" in adopting the "knowing or reckless" standard. *Ante*, at 133, citing Roget's International Thesaurus § 622.7, p. 479; § 653.9, p. 501 (4th ed. 1977). The Court fails to acknowledge, however, that the dictionary includes a wide variety of definitions of "willful," ranging from "malicious" to "not accidental," and including precisely the intermediate definition urged by the Secretary—under which an act is willful if it is "done without ground for believing it is lawful." Black's Law Dictionary 1434 (5th ed. 1979); see *United States* v. *Murdock*, 290 U. S. 389, 394 (1933) (acknowledging all three possible meanings of "willful"). By refusing to recognize the various meanings that the term "willful" has come to bear in different legal settings, the Court today departs from our previous contextual approach to defining that term. In *Spies* v. *United States*, 317 U. S. 492, 497 (1943), this Court explained that "willful" is a word "of many meanings, its construction often being influenced by its context." Since *Spies*, we consistently have looked to the statutory context in which the word appears in order to determine its proper meaning. See, *e. g., Screws* v. *United States*, 325 U. S. 91, 101–103 (1945); *United States* v. *Bishop*, 412 U. S. 346, 356–361 (1973). The Court's apparent abandonment of this approach in favor of a nonexistent "plain language" definition of "willful," *ante*, at 133, is unprecedented and unwise.

Had the Court properly applied the traditional contextual approach, I believe it would have adopted the willfulness standard urged by the Secretary. Such an approach would have revealed that the definition of "willful" adopted previously in the context of the ADEA in *Trans World Airlines, Inc.* v. *Thurston, supra,* does not transplant easily to the context of the FLSA. In *Thurston,* this Court explicitly acknowledged that its choice of the "knowing or reckless" definition of "willful" was influenced by the "punitive" nature of the double damages that flow from a finding of willfulness under the ADEA. *Id.*, at 125. In the instant case, a finding of willfulness leads not to a punitive sanction, but merely to an extended period during which an unlawfully underpaid employee may recover compensatory damages. What is at stake here is the applicability of the remedial provisions of the FLSA in the first instance. Perhaps recognizing this crucial distinction, the Court in *Thurston* expressly left open the possibility that the "knowing or reckless" definition of "willful" adopted for the ADEA might not be appropriate for the FLSA statute of limitations. See *id.*, at 127–128, and n. 21. The answer that the Court provides today may have an attractive tidiness, but it fails to recognize the contextual differences that call for different standards of willfulness in varying provisions of the two Acts.* As a result, the Court has adopted a definition of "willful" that is improperly narrow in light of its effect on the remedial scope of the FLSA.

Just how narrow that definition is remains to be seen. It is not entirely clear that the "knowing or reckless" definition of willfulness adopted by the Court will differ significantly in practical application from the approach that I would adopt. Employers who know that there is an appreciable possibility that the FLSA covers their operations but fail to take reasonable measures to resolve their doubts may well be deemed "reckless" in many cases under the *Thurston* standard. Although it is difficult to foretell, it appears to me unlikely that a large number of FLSA defendants will fall into the narrow category of employers who "unreasonably" but not "recklessly" fail to apprise themselves of the requirements of the

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*The Court bases its adoption of the *Thurston* standard of willfulness on the fear that the Secretary's alternative standard, like the *Jiffy June* standard, would undermine Congress' two-tiered liability scheme by permitting a finding of willfulness on a showing of "nothing more than negligence." *Ante*, at 135. This fear is ungrounded. In order for a violation to be "willful" under the Secretary's standard, an employer must operate in the face of a known risk that the FLSA covers its operation, without taking reasonable steps to ensure its compliance. This state of mind is sufficiently different from mere negligence to maintain the two-tiered structure of the FLSA.

Act. See *ante*, at 135, n. 13. Despite the potentially small significance of our different interpretations, however, I cannot agree with the Court's approach to or resolution of the willfulness issue in this case. I therefore respectfully dissent.

CHICK KAM CHOO ET AL. *v.* EXXON CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 87–505. Argued March 30, 1988—Decided May 16, 1988

After Leong Chong, a Singapore resident, was accidentally killed in that country while performing repair work on a ship owned by one of the respondents, a subsidiary of the other respondent, his widow, petitioner Chick Kam Choo (hereafter petitioner), also a Singapore resident, brought suit in Federal District Court alleging various causes of action, including claims under the general federal maritime law and the Texas Wrongful Death Statute. In 1980, the court granted respondents summary judgment on the maritime law claim, concluding that applicable choice-of-law principles required that Singapore law, and not the maritime law of the United States, should apply. The court also dismissed the rest of the case on federal *forum non conveniens* grounds, provided that respondents submit to the Singapore courts' jurisdiction. Petitioner then filed suit in the Texas state courts under the Texas statutes and Singapore law, but the Federal District Court enjoined petitioner from prosecuting any claims relating to her husband's death in the state courts. The Court of Appeals affirmed, rejecting petitioner's contention that the injunction violated the Anti-Injunction Act (Act), which generally bars federal courts from enjoining state court proceedings. The court ruled that the injunction fell within the Act's "relitigation" exception, which permits a federal court to issue an injunction "to protect or effectuate its judgments."

Held: Because the District Court's injunction barring the state court proceedings is broader than is necessary "to protect or effectuate" that court's 1980 judgment dismissing petitioner's lawsuit from federal court, this case must be remanded for the entry of a more narrowly tailored order. Pp. 145–151.

(a) An essential prerequisite for applying the Act's relitigation exception is that the claims or issues which the federal injunction insulates from state court litigation actually have been decided by the federal court. This prerequisite is strict and narrow, requiring an assessment of the precise state of the record and what the earlier federal order *actually* said; it does not permit a *post hoc* judgment as to what the order was *intended* to say. *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281. Pp. 146–148.

(b) Thus, since the 1980 judgment did not resolve the merits of petitioner's Singapore law claim, the injunction exceeded the Act's restrictions insofar as it barred the state courts from considering that claim. The 1980 judgment simply resolved that petitioner's claims should be dismissed under the federal *forum non conveniens* doctrine, and did not determine whether the *state* courts are an appropriate forum for the Singapore law claim. The Texas courts would apply a significantly different *forum non conveniens* analysis than the federal courts, and might well consider themselves an appropriate forum, in light of an "open courts" provision in the State Constitution. The argument that an independent state *forum non conveniens* determination is pre-empted under the "reverse-*Erie*" principle of federal maritime law, see, *e. g.*, *Offshore Logistics, Inc.* v. *Tallentire,* 477 U. S. 207, 222–223, cannot help respondents, since that pre-emption question was not actually litigated and decided by the District Court. When a state proceeding presents a federal issue, even a pre-emption issue, the proper course under the Act is to allow the state court to resolve the issue. Pp. 148–150.

(c) Since petitioner's state law claim was necessarily adjudicated in the original federal action by the District Court's choice-of-law ruling that Singapore law controls petitioner's suit, the injunction, insofar as it barred the state courts from considering the state law claim, is within the scope of the relitigation exception and is permissible under the Act. Pp. 150–151.

(d) The fact that an injunction *may* issue under the Act does not mean that it *must* issue. On remand the District Court should decide whether it is appropriate to enter an injunction. P. 151.

817 F. 2d 307, reversed and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion, *post*, p. 151.

Benton Musslewhite, pro se, argued the cause for petitioners. With him on the briefs were *Joseph C. Blanks, pro se, Joel I. Klein,* and *David Boyd.*

James Patrick Cooney argued the cause and filed a brief for respondents.*

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*Briefs of *amici curiae* urging affirmance were filed for Crowley Maritime Corp. by *Ernest N. Reddick III;* for the International Association of Drilling Contractors et al. by *Eugene J. Silva;* for the International Chamber of Shipping by *John R. Geraghty;* for the Maritime Law Association of the United States by *John C. McHose, Richard W. Palmer,* and *Michael*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case concerns the propriety of an injunction entered by the United States District Court for the Southern District of Texas. The injunction prohibited specified parties from litigating a certain matter in the Texas state courts. We must determine whether this injunction is permissible under the Anti-Injunction Act, 28 U. S. C. § 2283, which generally bars federal courts from granting injunctions to stay proceedings in state courts.

I

In 1977 Leong Chong, a resident of the Republic of Singapore, was accidentally killed in that country while performing repair work on a ship owned by respondent Esso Tankers, Inc., a subsidiary of respondent Exxon Corporation. Petitioner Chick Kam Choo, also a resident of Singapore, is Chong's widow.[†] In 1978 she brought suit in the United States District Court for the Southern District of Texas, presenting claims under the Jones Act, 46 U. S. C. § 688, the Death on the High Seas Act (DOHSA), 46 U. S. C. § 761, the general maritime law of the United States, App. 4, and the Texas Wrongful Death Statute, Tex. Civ. Prac. & Rem. Code Ann. §§ 71.001–71.031 (1986).

Respondents moved for summary judgment on the Jones Act and DOHSA claims, arguing that Chong was not a seaman, which rendered the Jones Act inapplicable, and that Chong had not died on the "high seas" but while the ship was in port, which rendered the DOHSA inapplicable. App. 9–10. Respondents also moved for summary judgment on the claim involving the general maritime law of the United

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Marks Cohen; and for McClelland Engineers, Inc., et al. by *Harold A. Stone, Steven M. Perl, Graydon S. Staring,* and *Elliot L. Bien.*

Burt Ballanfant filed a brief for Shell Oil Co. as *amicus curiae.*

[†] Choo's attorneys, Benton Musslewhite and Joseph C. Blanks, having been specifically enjoined by the District Court, are also petitioners before this Court. For convenience, however, we shall use the term "petitioner" to refer only to Choo.

States, arguing that due to the lack of substantial contacts with the United States, the maritime law of Singapore, not that of the United States, governed. *Id.*, at 10 (citing *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953); *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354 (1959)). In addition to seeking summary judgment, respondents moved for dismissal under the doctrine of *forum non conveniens*, arguing that under the criteria identified in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 (1947), the District Court was not a convenient forum.

In 1980, the District Court, adopting the memorandum and recommendations of a Magistrate, granted respondents' motion for summary judgment on the Jones Act and DOHSA claims. The court agreed with respondents that those statutes were inapplicable. App. 29–31, 34. With respect to the general maritime law claim, the District Court applied factors identified in *Lauritzen* and *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U. S. 306 (1970), to the choice-of-law question and concluded that the "statutory and maritime law of the United States should not be applied." App. 32. This conclusion led the court to grant summary judgment on petitioner's general maritime law claim, as well as to consider whether dismissal of the rest of the case was warranted under the doctrine of *forum non conveniens*. After reviewing the various factors set out in *Gilbert*, the court concluded that dismissal was appropriate and accordingly granted respondents' motion to dismiss on *forum non conveniens* grounds, provided respondents submit to the jurisdiction of the Singapore courts. The Court of Appeals for the Fifth Circuit affirmed. *Chick Kam Choo* v. *Exxon Corp.*, 699 F. 2d 693, cert. denied, 464 U. S. 826 (1983).

Rather than commence litigation in Singapore, however, petitioner filed suit in the Texas state courts. Although the state complaint initially included all the claims in the federal complaint, as well as a claim based on Singapore law, petitioner later voluntarily dismissed the federal claims. This left only the Texas state law claim and the Singapore law claim. See Brief for Petitioners 4, n. 4. Respondents briefly succeeded in removing the case to the District Court on the basis of diversity of citizenship, but the Court of Appeals for the Fifth Circuit ultimately held that complete diversity did not exist and the case was returned to the District Court with instructions to remand it to state court. 764 F. 2d 1148 (1985).

Respondents then initiated a new action in federal court requesting an injunction to prevent petitioner and her attorneys, Benton Musslewhite and Joseph C. Blanks, "from seeking to relitigate in any state forum the issues finally decided" in the federal court's 1980 dismissal. App. 93. Petitioner moved to dismiss, arguing that the Anti-Injunction Act, 28 U. S. C. § 2283, prohibited the issuance of such an injunction. App. 96–98. Respondents, in turn, moved for summary judgment and a final injunction. *Id.*, at 104–108. The District Court granted respondents' motion and permanently enjoined petitioner and her attorneys "from prosecuting or commencing any causes of action or claims against [respondents] in the courts of the State of Texas or any other state . . . arising out of or related to the alleged wrongful death of Leong Chong." *Id.*, at 119.

Petitioner appealed, reiterating her contention that the injunction violated the Anti-Injunction Act. A divided panel of the Court of Appeals for the Fifth Circuit rejected this argument. The panel majority concluded that the injunction here fell within the "relitigation" exception to the Act, which permits a federal court to issue an injunction "to protect or effectuate its judgments." The majority reasoned that an injunction was necessary to prevent relitigation of the *forum non conveniens* issue because petitioner pointed to no additional factor that made the "Texas court in Houston a more convenient forum for this litigation than a United States District Court in Houston." 817 F. 2d 307, 312 (1987). The majority acknowledged that due to an "open courts" provision in the Texas Constitution, Art. I, § 13, which is reflected in the Texas Wrongful Death Statute, Tex. Civ. Prac. & Rem. Code Ann. § 71.031 (1986), the state courts may not apply the same, or indeed, any *forum non conveniens* analysis to petitioner's case. Rather, as the Court of Appeals noted, it is possible that "Texas has constituted itself the world's forum of final resort, where suit for personal injury or death may always be filed if nowhere else." 817 F. 2d, at 314 (footnote omitted). In this maritime context, however, the Court of Appeals majority concluded that the so-called "reverse-*Erie*" uniformity doctrine, see, *e. g., Offshore Logistics, Inc.* v. *Tallentire*, 477 U. S. 207, 222–223 (1986), required that federal *forum non conveniens* determinations pre-empt state law. Because the Court of Appeals found any independent state *forum non conveniens* inquiry to be pre-empted, it held that the injunction was permissible. Chief Judge Clark wrote separately but joined this conclusion. 817 F. 2d, at 325. Judge Reavley dissented, maintaining that the Texas courts should be allowed to apply their own open courts *forum non conveniens* standard. The dissent also criticized the majority's "bold new rule of preemption" which had the effect of "nullify[ing] the Texas open forum law for admiralty cases." *Ibid.*

The Court of Appeals' ruling conflicted with a decision of the Court of Appeals for the Ninth Circuit, *Zipfel* v. *Halliburton Co.*, 832 F. 2d 1477 (1988), cert. pending *sub nom. Crowley Maritime Corp.* v. *Zipfel*, No. 87–1122, which held that the Anti-Injunction Act precluded an injunction in similar circumstances. We granted certiorari to resolve the conflict, 484 U. S. 952 (1987), and now reverse and remand.

II

The Anti-Injunction Act generally prohibits the federal courts from interfering with proceedings in the state courts:

> "A court of the United States may not grant an injunction to stay proceedings in a State Court except as ex-

> pressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U. S. C. § 2283.

The Act, which has existed in some form since 1793, see Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 335, is a necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts. It represents Congress' considered judgment as to how to balance the tensions inherent in such a system. Prevention of frequent federal court intervention is important to make the dual system work effectively. By generally barring such intervention, the Act forestalls "the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court." *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U. S. 623, 630–631 (1977) (plurality opinion). Due in no small part to the fundamental constitutional independence of the States, Congress adopted a general policy under which state proceedings "should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 287 (1970).

Congress, however, has permitted injunctions in certain, specific circumstances, namely, when expressly authorized by statute, necessary in aid of the court's jurisdiction, or necessary to protect or effectuate the court's judgment. These exceptions are designed to ensure the effectiveness and supremacy of federal law. But as the Court has recognized, the exceptions are narrow and are "not [to] be enlarged by loose statutory construction." *Ibid.* See also *Clothing Workers* v. *Richman Brothers Co.*, 348 U. S. 511, 514 (1955). Because an injunction staying state proceedings is proper only if it falls within one of the statutory exceptions, *Atlantic Coast Line*, *supra*, at 286–287, and because the last of the three exceptions is the only one even arguably applicable here, the central question in this case is whether the District Court's injunction was necessary "to protect or effectuate" the District Court's 1980 judgment dismissing petitioner's lawsuit from federal court.

The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of *res judicata* and collateral estoppel. The proper scope of the exception is perhaps best illustrated by this Court's decision in *Atlantic Coast Line, supra.*

That case arose out of a union's decision to picket a railroad. The railroad immediately sought an injunction from a Federal District Court to prevent the picketing. The court refused to enjoin the union, issuing an order in 1967 that concluded, in part, that the unions were "free to engage in self-help." *Id.*, at 289. The railroad then went to state court, where an injunction was granted. Two years later this Court held that the Railway Labor Act, 45 U. S. C. § 151 *et seq.*, prohibited state court injunctions such as the one the railroad had obtained. *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369 (1969). This decision prompted the union to move in state court to dissolve the injunction, but the state court declined to do so. Rather than appeal, however, the union returned to federal court and obtained an injunction against the enforcement of the state court injunction. The District Court read its 1967 order as deciding not just that federal law did not authorize an injunction, but that federal law pre-empted the State from interfering with the union's right of self-help by issuing an injunction. Accordingly, the court concluded that an injunction was necessary to protect that judgment.

The Court of Appeals affirmed, but this Court reversed, holding that the federal court injunction was improper even assuming that the state court's refusal to dissolve its injunction was erroneous. 398 U. S., at 291, n. 5. After carefully reviewing the arguments actually presented to the District Court in the original 1967 litigation and the precise language of the District Court's order, we rejected the District Court's later conclusion that its 1967 order had addressed the propriety of an injunction issued by a state court:

> "Based solely on the state of the record when the [1967] order was entered, we are inclined to believe that the District Court did not determine whether federal law precluded an injunction based on state law. Not only was that point never argued to the court, but there is no language in the order that necessarily implies any decision on that question." *Id.*, at 290.

Thus, as *Atlantic Coast Line* makes clear, an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court. Moreover, *Atlantic Coast Line* illustrates that this prerequisite is strict and narrow. The Court assessed the precise state of the record and what the earlier federal order *actually* said; it did not permit the District Court to render a *post hoc* judgment as to what the order was *intended* to say. With these principles in mind, we turn to the two claims petitioner seeks to litigate in the Texas state courts.

First, petitioner asserts a claim under Singapore law. App. 40. The District Court did not resolve the merits of this claim in its 1980 order. Rather, the only issue decided by the District Court was that petitioner's claims should be dismissed under the federal *forum non conveniens* doctrine. Federal *forum non conveniens* principles simply cannot determine whether Texas courts, which operate under a broad "open-courts" mandate, would consider themselves an appropriate forum for petitioner's lawsuit. See Tex. Const., Art. I, § 13; Tex. Civ. Prac. & Rem. Code Ann. § 71.031 (1986). Cf. *Pennzoil Co.* v. *Texaco, Inc.*, 481 U. S. 1, 11–12 (1987). Respondents' arguments to the District Court in 1980 reflected this distinction, citing federal cases almost exclusively and discussing only federal *forum non conveniens* principles. See App. 10–12, 17–26. Moreover, the Court of Appeals expressly recognized that the Texas courts would apply a significantly different *forum non conveniens* analysis. 817 F. 2d, at 314. Thus, whether the Texas *state* courts are an appropriate forum for petitioner's Singapore law claims has not yet been litigated, and an injunction to foreclose consideration of that issue is not within the relitigation exception.

Respondents seek to avoid this problem by arguing that any separate state law determination is pre-empted under the "reverse-*Erie*" principle of federal maritime law. See generally *Offshore Logistics, Inc.* v. *Tallentire,* 477 U. S., at 222–223; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149 (1920); *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205 (1917). Under this view, which was shared by the Court of Appeals, the only permissible *forum non conveniens* determination in this maritime context is the one made by the District Court, and an injunction may properly issue to prevent the state courts from undertaking any different approach.

The contention that an independent state *forum non conveniens* determination is pre-empted by federal maritime law, however, does little to help respondents unless that pre-emption question was itself actually litigated and decided by the District Court. Since respondents concede that it was not, Tr. of Oral Arg. 32, the relitigation exception cannot apply. As we have previously recognized, "a federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area pre-empted by federal law, even when the interference is unmistakably clear." *Atlantic Coast Line,* 398 U. S., at 294. See also *Clothing Workers* v. *Richman Brothers Co.,* 348 U. S. 511 (1955). Rather, when a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court.

This is the course respondents must follow with respect to the Singapore law claim. It may be that respondents' reading of the pre-emptive force of federal maritime *forum non conveniens* determinations is correct. This is a question we need not reach and on which we express no opinion. We simply hold that respondents must present their pre-emption argument to the Texas state courts, which are presumed competent to resolve federal issues. Cf. *Pennzoil Co.* v. *Texaco, Inc.*, *supra*, at 15–16; *Clothing Workers*, *supra*, at 518. Accordingly, insofar as the District Court enjoined the state courts from considering petitioner's Singapore law claim, the injunction exceeded the restrictions of the Anti-Injunction Act.

Finally, petitioner asserts a claim under Texas state law. In contrast to the Singapore law claim, the validity of this claim was adjudicated in the original federal action. Respondents argued to the District Court in 1980 that under applicable choice-of-law principles, the law of Singapore must control petitioner's suit. See App. 10. The District Court expressly agreed, noting that only two of the eight relevant factors "point toward American law," and concluding that the "statutory and maritime law of the United States should not be applied." *Id.*, at 32. Petitioner seeks to relitigate this issue in state court by arguing that "there are substantial and/or significant contacts" with the United States such that "the application of American and Texas law is mandated." *Id.*, at 39. Because in its 1980 decision the District Court decided that Singapore law must control petitioner's lawsuit, a decision that necessarily precludes the application of Texas law, an injunction preventing relitigation of that issue in state court is within the scope of the relitigation exception to the Anti-Injunction Act. Accordingly, insofar as the District Court enjoined the state courts from considering petitioner's claim under the substantive law of Texas, the injunction was permissible.

Because the injunction actually entered by the District Court, *id.*, at 118–119, was broader than the limited injunction we find acceptable, we must reverse the judgment approving a broad injunction and remand for entry of a more narrowly tailored order. Of course, the fact that an injunction *may* issue under the Anti-Injunction Act does not mean that it *must* issue. On remand the District Court should decide whether it is appropriate to enter an injunction.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, concurring.

I agree with the Court that, as a general matter, "[f]ederal *forum non conveniens* principles simply cannot determine whether [state] courts, which operate under a broad 'open-courts' mandate, [will] consider themselves an appropriate forum" for a federal litigant's lawsuit. *Ante*, at 148. Consequently, in diversity cases—for example—a district court's dismissal on *forum non conveniens* grounds cannot serve as a basis for a later injunction if the plaintiff subsequently brings the same action in a state court.

But, as the Court recognizes, this case involves the special area of federal maritime law. *Ante*, at 149. In this field, the federal interest in uniformity is so substantial that a determination that federal law requires that a case be heard in a foreign forum could possibly pre-empt any contrary determination by a state court applying state *forum non conveniens* law. The Court acknowledges that our precedents may ultimately support such a conclusion in this case. *Ante*, at 149–150.

Had the District Court made such a finding here when it dismissed petitioner's case—holding that federal maritime law required that this case be heard in Singapore—then I believe that the relitigation exception found in 28 U. S. C. § 2283 would permit the injunction that the District Court later issued. Contra, *Zipfel* v. *Halliburton Co.*, 832 F. 2d 1477, 1488 (CA9 1988), cert. pending *sub nom. Crowley Maritime Corp.* v. *Zipfel*, No. 87–1122. This is true whether or not a finding of such pre-emption would have been correct: petitioner's remedy for an erroneous pre-emption decision would have been an appeal of the District Court's dismissal, and not relitigation of the issue in state court. However, the District Court's terse dismissal order in this case lacks any express ruling on uniformity or pre-emption. See App. 34–35. Absent such a holding, the District Court had no "judgment" on this question which it needed to "protect or effectuate" by enjoining the subsequent state court litigation. Cf. 28 U. S. C. § 2283.

Consequently, I agree with the Court that the relitigation exception to § 2283 cannot be invoked here, *ante*, at 150, and the judgment of the Court of Appeals affirming the District Court's injunction must be reversed in pertinent part.

WHEAT *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87–4. Argued March 2, 1988—Decided May 23, 1988

Petitioner, along with numerous codefendants including Gomez-Barajas and Bravo, was charged with participating in a far-flung drug distribution conspiracy. At the time of petitioner's trial, the District Court was considering Gomez-Barajas' offer to plead guilty to certain charges stemming from the conspiracy, and had already accepted Bravo's guilty plea to one count. Both Gomez-Barajas and Bravo were represented by attorney Iredale. Two court days before his trial was to commence, petitioner moved for the substitution of Iredale as his counsel as well. Despite petitioner's assertion of his Sixth Amendment right to the counsel of his choice, and his willingness, as well as that of Gomez-Barajas and Bravo, to waive the right to conflict-free counsel, the court denied the substitution motion on the basis of irreconcilable and unwaiveable conflicts of interest for Iredale created by the likelihood that petitioner would be called to testify at any subsequent trial of Gomez-Barajas, and that Bravo would testify at petitioner's trial. Petitioner therefore proceeded to trial with his original counsel and was convicted. The Court of Appeals affirmed.

Held: The District Court did not err in declining petitioner's waiver of his right to conflict-free counsel and in refusing to permit his proposed substitution of attorneys. In multiple-representation cases, district courts have a duty to take such measures as are appropriate to protect criminal defendants against counsel's conflicts of interest, including the issuance of separate representation orders. Moreover, they often must do so at the pretrial stage, where relationships between parties are unclear, and the likelihood and dimensions of nascent conflicts of interest are hard to predict. The provision of waivers by all affected parties will not necessarily cure any problems, since the courts have an independent interest in assuring compliance with ethical standards and the appearance of fairness, and since several Courts of Appeals have demonstrated an apparent willingness to entertain ineffective-assistance claims by defendants who have specifically waived the right to conflict-free counsel. Thus, the district courts must be allowed substantial latitude to evaluate in the light of their informed judgment the facts and circumstances of each case, including any attempt by the Government to "manufacture" a conflict to prevent a defendant from obtaining particularly able counsel.

Although the courts must recognize the Sixth Amendment presumption in favor of counsel of choice, that presumption may be overcome not only by a demonstration of actual conflict but also by a showing of a serious potential for conflict. Here, where the substitution motion was made so close to trial, it cannot be said that the District Court abused its discretion, since it was presented with complex litigation that was likely to engender conflicts of interest for Iredale if he was permitted to represent both petitioner and his codefendants. Pp. 158–164.

813 F. 2d 1399, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 165. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 172.

John J. Cleary argued the cause and filed briefs for petitioner.

Michael K. Kellogg argued the cause for the United States. With him on the brief were *Solicitor General Fried, Assistant Attorney General Weld, Deputy Solicitor General Bryson,* and *Louis M. Fischer.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The issue in this case is whether the District Court erred in declining petitioner's waiver of his right to conflict-free counsel and by refusing to permit petitioner's proposed substitution of attorneys.

I

Petitioner Mark Wheat, along with numerous codefendants, was charged with participating in a far-flung drug distribution conspiracy. Over a period of several years, many thousands of pounds of marijuana were transported from Mexico and other locations to southern California. Petitioner acted primarily as an intermediary in the distribution ring; he received and stored large shipments of marijuana at his home, then distributed the marijuana to customers in the region.

Also charged in the conspiracy were Juvenal Gomez-Barajas and Javier Bravo, who were represented in their criminal proceedings by attorney Eugene Iredale. Gomez-Barajas was tried first and was acquitted on drug charges overlapping with those against petitioner. To avoid a second trial on other charges, however, Gomez-Barajas offered to plead guilty to tax evasion and illegal importation of merchandise. At the commencement of petitioner's trial, the District Court had not accepted the plea; Gomez-Barajas was thus free to withdraw his guilty plea and proceed to trial.

Bravo, evidently a lesser player in the conspiracy, decided to forgo trial and plead guilty to one count of transporting approximately 2,400 pounds of marijuana from Los Angeles to a residence controlled by Victor Vidal. At the conclusion of Bravo's guilty plea proceedings on August 22, 1985, Iredale notified the District Court that he had been contacted by petitioner and had been asked to try petitioner's case as well. In response, the Government registered substantial concern about the possibility of conflict in the representation. After entertaining some initial discussion of the substitution of counsel, the District Court instructed the parties to present more detailed arguments the following Monday, just one day before the scheduled start of petitioner's trial.

At the Monday hearing, the Government objected to petitioner's proposed substitution on the ground that Iredale's representation of Gomez-Barajas and Bravo created a serious conflict of interest. The Government's position was premised on two possible conflicts. First, the District Court had not yet accepted the plea and sentencing arrangement negotiated between Gomez-Barajas and the Government; in the event that arrangement were rejected by the court, Gomez-Barajas would be free to withdraw the plea and stand trial. He would then be faced with the prospect of representation by Iredale, who in the meantime would have acted as petitioner's attorney. Petitioner, through his participation in the drug distribution scheme, was familiar with the sources and size of Gomez-Barajas' income, and was thus likely to be called as a witness for the Government at any subsequent trial of Gomez-Barajas. This scenario would pose a conflict of interest for Iredale, who would be prevented from cross-examining petitioner and thereby from effectively representing Gomez-Barajas.

Second, and of more immediate concern, Iredale's representation of Bravo would directly affect his ability to act as counsel for petitioner. The Government believed that a portion of the marijuana delivered by Bravo to Vidal's residence eventually was transferred to petitioner. In this regard, the Government contacted Iredale and asked that Bravo be made available as a witness to testify against petitioner, and agreed in exchange to modify its position at the time of Bravo's sentencing. In the likely event that Bravo were called to testify, Iredale's position in representing both men would become untenable, for ethical proscriptions would forbid him to cross-examine Bravo in any meaningful way. By failing to do so, he would also fail to provide petitioner with effective assistance of counsel. Thus, because of Iredale's prior representation of Gomez-Barajas and Bravo and the potential for serious conflict of interest, the Government urged the District Court to reject the substitution of attorneys.

In response, petitioner emphasized his right to have counsel of his own choosing and the willingness of Gomez-Barajas, Bravo, and petitioner to waive the right to conflict-free counsel. Petitioner argued that the circumstances posited by the Government that would create a conflict for Iredale were highly speculative and bore no connection to the true relationship between the co-conspirators. If called to testify, Bravo would simply say that he did not know petitioner and had no dealings with him; no attempt by Iredale to impeach Bravo would be necessary. Further, in the unlikely event that Gomez-Barajas went to trial on the charges of tax evasion and illegal importation, petitioner's lack of involvement in those alleged crimes made his appearance as a witness highly improbable. Finally, and most importantly, all three defendants agreed to allow Iredale to represent petitioner and to waive any future claims of conflict of interest. In petitioner's view, the Government was manufacturing implausible conflicts in an attempt to disqualify Iredale, who had already proved extremely effective in representing Gomez-Barajas and Bravo.

After hearing argument from each side, the District Court noted that it was unfortunate that petitioner had not suggested the substitution sooner, rather than two court days before the commencement of trial. The court then ruled:

> "[B]ased upon the representation of the Government in [its] memorandum that the Court really has no choice at this point other than to find that an irreconcilable conflict of interest exists. I don't think it can be waived, and accordingly, Mr. Wheat's request to substitute Mr. Iredale in as attorney of record is denied." App. 100–101.

Petitioner proceeded to trial with his original counsel and was convicted of conspiracy to possess more than 1,000 pounds of marijuana with intent to distribute, in violation of 21 U. S. C. § 846, and five counts of possessing marijuana with intent to distribute, in violation of § 841(a)(1).

The Court of Appeals for the Ninth Circuit affirmed petitioner's convictions, 813 F. 2d 1399 (1987), finding that, within the limits prescribed by the Sixth Amendment, the District Court has considerable discretion in allowing substitution of counsel. The Court of Appeals found that the District Court had correctly balanced two Sixth Amendment rights: (1) the qualified right to be represented by counsel of one's choice, and (2) the right to a defense conducted by an attorney who is free of conflicts of interest. Denial of either of these rights threatened the District Court with an appeal assigning the ruling as reversible error, and the Court of Appeals concluded that the District Court did not abuse its discretion in declining to allow the substitution or addition of Iredale as trial counsel for petitioner.[1]

Because the Courts of Appeals have expressed substantial disagreement about when a district court may override a defendant's waiver of his attorney's conflict of interest,[2] we granted certiorari, 484 U. S. 814 (1987).

II

The Sixth Amendment to the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." In *United States* v. *Morrison*, 449 U. S. 361, 364 (1981), we observed that this right was designed to assure fairness in the adversary criminal process. Realizing that an unaided layman may have little skill in arguing the law or in coping with an intricate procedural system, *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932); *United States* v. *Ash*, 413 U. S. 300, 307 (1973), we have held that the Sixth Amendment secures the right to the assistance of counsel, by appointment if necessary, in a trial for any serious crime. *Gideon* v. *Wainwright*,

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[1] The Court of Appeals also found that petitioner was not prejudiced by a conference the District Court held with counsel in petitioner's absence, and that petitioner had no right to insist upon a plea bargain from the Government. Our grant of certiorari, however, was limited to the issue addressed in the text of this opinion, and we do not reach the other rulings made by the Court of Appeals.

[2] See, *e. g.*, *In re Paradyne Corp.*, 803 F. 2d 604, 611, n. 16 (CA11 1986) (the right of counsel "does not override the broader societal interests in the effective administration of justice . . . or in the maintenance of 'public confidence in the integrity of our legal system'") (citation omitted); *In re Grand Jury Subpoena Served Upon Doe*, 781 F. 2d 238, 250–251 (CA2), cert. denied *sub nom. Roe* v. *United States*, 475 U. S. 1108 (1986) ("[C]ourts have the power and duty to disqualify counsel where the public interest in maintaining the integrity of the judicial system outweighs the accused's constitutional right"); *United States* v. *Reese*, 699 F. 2d 803, 805 (CA6 1983) (a trial court should override a defendant's knowing waiver only in "compelling circumstances"); *United States* v. *Flanagan*, 679 F. 2d 1072, 1076 (CA3 1982) (a trial court may refuse a waiver when an actual conflict is "very likely"), rev'd on other grounds, 465 U. S. 259 (1984).

372 U. S. 335 (1963). We have further recognized that the purpose of providing assistance of counsel "is simply to ensure that criminal defendants receive a fair trial," *Strickland* v. *Washington,* 466 U. S. 668, 689 (1984), and that in evaluating Sixth Amendment claims, "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." *United States* v. *Cronic,* 466 U. S. 648, 657, n. 21 (1984). Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers. See *Morris* v. *Slappy,* 461 U. S. 1, 13–14 (1983); *Jones* v. *Barnes,* 463 U. S. 745 (1983).

The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court.[3] Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the Government. The question raised in this case is the extent to which a criminal defendant's right under the Sixth Amendment to his chosen attorney is qualified by the fact that the attorney has represented other defendants charged in the same criminal conspiracy.

In previous cases, we have recognized that multiple representation of criminal defendants engenders special dangers of which a court must be aware. While "permitting a single attorney to represent codefendants . . . is not *per se* violative of constitutional guarantees of effective assistance of counsel," *Holloway* v. *Arkansas*, 435 U. S. 475, 482 (1978), a court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel. See also *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980). As we said in *Holloway:*

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[3] Our holding in *Faretta* v. *California,* 422 U. S. 806 (1975), that a criminal defendant has a Sixth Amendment right to represent *himself* if he voluntarily elects to do so, does not encompass the right to choose any advocate if the defendant wishes to be represented by counsel.

> "Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. . . . [A] conflict may . . . prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another." 435 U. S., at 489–490.

Petitioner insists that the provision of waivers by all affected defendants cures any problems created by the multiple representation. But no such flat rule can be deduced from the Sixth Amendment presumption in favor of counsel of choice. Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. Both the American Bar Association's Model Code of Professional Responsibility and its Model Rules of Professional Conduct, as well as the rules of the California Bar Association (which governed the attorneys in this case), impose limitations on multiple representation of clients. See ABA Model Code of Professional Responsibility DR5–105(C) (1980); ABA Model Rules of Professional Conduct, Rule 1.7 (1984); Rules of Professional Conduct of the State Bar of California, Rules 5 and 7, Cal. Bus. & Prof. Code Ann. § 6076 (West 1974). Not only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation.

For this reason, the Federal Rules of Criminal Procedure direct trial judges to investigate specially cases involving joint representation. In pertinent part, Rule 44(c) provides:

> "[T]he court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel."

Although Rule 44(c) does not specify what particular measures may be taken by a district court, one option suggested by the Notes of the Advisory Committee is an order by the court that the defendants be separately represented in subsequent proceedings in the case. 18 U. S. C. App., p. 650. This suggestion comports with our instructions in *Holloway* and in *Glasser* v. *United States*, 315 U. S. 60 (1942), that the trial courts, when alerted by objection from one of the parties, have an independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment.

To be sure, this need to investigate potential conflicts arises in part from the legitimate wish of district courts that their judgments remain intact on appeal. As the Court of Appeals accurately pointed out, trial courts confronted with multiple representations face the prospect of being "whipsawed" by assertions of error no matter which way they rule. If a district court agrees to the multiple representation, and the advocacy of counsel is thereafter impaired as a result, the defendant may well claim that he did not receive effective assistance. See, *e. g.*, *Burger* v. *Kemp*, 483 U. S. 776 (1987). On the other hand, a district court's refusal to accede to the multiple representation may result in a challenge such as petitioner's in this case. Nor does a waiver by the defendant necessarily solve the problem, for we note, without passing judgment on, the apparent willingness of Courts of Appeals to entertain ineffective-assistance claims from defendants who have specifically waived the right to conflict-free counsel. See, *e. g., United States ex rel. Tonaldi* v. *Elrod,* 716 F. 2d 431, 436–437 (CA7 1983); *United States* v. *Vowteras,* 500 F. 2d 1210, 1211 (CA2), cert. denied, 419 U. S. 1069 (1974); see also *Glasser, supra,* at 70 ("To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights").

Thus, where a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver, and insist that defendants be separately represented. As the Court of Appeals for the Third Circuit stated in *United States* v. *Dolan,* 570 F. 2d 1177, 1184 (1978):

> "[W]hen a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating the defendant's comprehension of the waiver."

Unfortunately for all concerned, a district court must pass on the issue whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pretrial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the Government's witnesses will say on the stand. A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants. These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics. Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them.

For these reasons we think the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses. In the circumstances of this case, with the motion for substitution of counsel made so close to the time of trial, the District Court relied on instinct and judgment based on experience in making its decision. We do not think it can be said that the court exceeded the broad latitude which must be accorded it in making this decision. Petitioner of course rightly points out that the Government may seek to "manufacture" a conflict in order to prevent a defendant from having a particularly able defense counsel at his side; but trial courts are undoubtedly aware of this possibility, and must take it into consideration along with all of the other factors which inform this sort of a decision.

Here the District Court was confronted not simply with an attorney who wished to represent two coequal defendants in a straightforward criminal prosecution; rather, Iredale proposed to defend three conspirators of varying stature in a complex drug distribution scheme. The Government intended to call Bravo as a witness for the prosecution at petitioner's trial.[4] The Government might readily have tied certain deliveries of marijuana by Bravo to petitioner, necessitating vigorous cross-examination of Bravo by petitioner's counsel. Iredale, because of his prior representation of Bravo, would have been unable ethically to provide that cross-examination.

Iredale had also represented Gomez-Barajas, one of the alleged kingpins of the distribution ring, and had succeeded in obtaining a verdict of acquittal for him. Gomez-Barajas had agreed with the Government to plead guilty to other charges, but the District Court had not yet accepted the plea arrangement. If the agreement were rejected, petitioner's probable testimony at the resulting trial of Gomez-Barajas would create an ethical dilemma for Iredale from which one or the other of his clients would likely suffer.

Viewing the situation as it did before trial, we hold that the District Court's refusal to permit the substitution of counsel in this case was within its discretion and did not violate petitioner's Sixth Amendment rights. Other district courts might have reached differing or opposite conclusions with equal justification, but that does not mean that one conclusion was "right" and the other "wrong." The District Court must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court.

The judgment of the Court of Appeals is accordingly

Affirmed.

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[4] Bravo was in fact called as a witness at petitioner's trial. See Tr. 728 *et seq.* His testimony was elicited to demonstrate the transportation of drugs that the prosecution hoped to link to petitioner.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

This Court today concludes that the District Court did not commit reversible error by denying the motion of petitioner Mark Wheat to add or substitute counsel of his choice. In the course of discussing the District Court's ruling, the Court sets forth several principles with which I agree. The Court acknowledges, as it must, that the Sixth Amendment's guarantee of assistance of counsel comprehends the right to select one's own attorney. The Court also states that, although this constitutional right is not absolute, it mandates a presumption in favor of accepting a criminal defendant's choice of counsel. Having articulated these principles, however, the Court unaccountably grants broad discretion to the trial court to decide whether this presumption has been overcome. As a consequence of this unwarranted deference to a trial court's decision respecting a constitutional right, the Court countenances a ruling that is patently incorrect. Because I believe that the potential for a conflict of interest in this case did not overcome petitioner's right to choose his own counsel, I dissent.

This Court long has recognized, and today reaffirms, that the Sixth Amendment provides protection for a criminal defendant's choice of counsel. More than 50 years ago, we stated that "[i]t is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell* v. *Alabama*, 287 U. S. 45, 53 (1932). This Court has reiterated this principle on frequent occasions. See, *e. g.*, *Chandler* v. *Fretag*, 348 U. S. 3, 9 (1954); *Glasser* v. *United States*, 315 U. S. 60, 70 (1942). Our statements on this score stem largely from an appreciation that a primary purpose of the Sixth Amendment is to grant a criminal defendant effective control over the conduct of his defense. As this Court previously has stated, the Sixth Amendment "grants to the accused personally the right to make his defense," because "it is he who suffers the consequences if the defense fails." *Faretta* v. *California*, 422 U. S. 806, 819–820 (1975). An obviously critical aspect of making a defense is choosing a person to serve as an assistant and representative. In addition, lodging the selection of counsel with the defendant generally will promote the fairness and integrity of criminal trials.

The right to counsel of choice, as the Court notes, is not absolute. When a defendant's selection of counsel, under the particular facts and circumstances of a case, gravely imperils the prospect of a fair trial, a trial court may justifiably refuse to accede to the choice. Thus, a trial court may in certain situations reject a defendant's choice of counsel on the ground of a potential conflict of interest, because a serious conflict may indeed destroy the integrity of the trial process. As the Court states, however, the trial court must recognize a presumption in favor of a defendant's counsel of choice. This presumption means that a trial court may not reject a defendant's chosen counsel on the ground of a potential conflict of interest absent a showing that both the likelihood and the dimensions of the feared conflict are substantial.[1] Unsupported or dubious speculation as to a conflict will not suffice. The Government must show a substantial potential for the kind of conflict that would undermine the fairness of the trial process. In these respects, I do not believe my position differs significantly, if at all, from that expressed in the opinion of the Court. See *ante*, at 161–162, 164.

I do disagree, however, with the Court's suggestion that the trial court's decision as to whether a potential conflict justifies rejection of a defendant's chosen counsel is entitled to some kind of special deference on appeal. The Court grants trial courts "broad latitude" over the decision to accept or reject a defendant's choice of counsel, *ante*, at 163; although never explicitly endorsing a standard of appellate review, the Court appears to limit such review to determining whether an abuse of discretion has occurred, see *ante*, at 164. This approach, which the Court supports solely by noting the difficulty of evaluating the likelihood and magnitude of a conflict, accords neither with the nature of the trial court's decision nor with the importance of the interest at stake.

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[1] In stating this principle, I mean to address only cases in which all parties to the potential conflict have made a fully informed waiver of their right to conflict-free representation. It is undisputed in this case that petitioner, as well as Juvenal Gomez-Barajas and Javier Bravo, had agreed to waive this right.

The trial court's decision as to whether the circumstances of a given case constitute grounds for rejecting a defendant's chosen counsel—that is, as to whether these circumstances present a substantial potential for a serious conflict of interest—is a mixed determination of law and fact. The decision is properly described in this way because it requires and results from the application of a legal standard to the established facts of a case. See, *e. g.*, *Townsend* v. *Sain*, 372 U. S. 293, 309, n. 6 (1963). Appellate courts traditionally do not defer to such determinations. See, *e. g.*, *ibid.*; *Sumner* v. *Mata*, 455 U. S. 591, 597, and n. 10 (1982). For this reason, the Court in *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), held that a trial court's determination as to whether an attorney had represented conflicting interests at trial was not entitled to any deference. The determination at issue here, which focuses on the potential for a conflict of interest, is not different in any relevant respect.[2]

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[2] It is true that a trial court, in making a determination regarding the potential for a conflict of interest, must make a prediction as to future events, which frequently is a difficult task. This aspect of the decision, however, does not call for a lax standard of review. The question on review is whether the trial court was correct in holding that the facts and circumstances apparent *at the time of its decision* demonstrated a substantial potential for a serious conflict of interest. Appellate courts are fully capable of posing and resolving this question. A deferential standard of review therefore is not necessary to generate appellate decisions that take into account and appropriately reflect the uncertainties existing at the time of the trial court's ruling.

The inappropriateness of deferring to this determination becomes even more apparent when its constitutional significance is taken into account. Cf. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 502–503 (1984) (stating that "[w]hen the standard governing the decision of a particular case is provided by the Constitution," close appellate scrutiny is particularly important). The interest at stake in this kind of decision is nothing less than a criminal defendant's Sixth Amendment right to counsel of his choice. The trial court simply does not have "broad latitude," *ante*, at 163, to vitiate this right. In my view, a trial court that rejects a criminal defendant's chosen counsel on the ground of a potential conflict should make findings on the record to facilitate review, and an appellate court should scrutinize closely the basis for the trial court's decision. Only in this way can a criminal defendant's right to counsel of his choice be appropriately protected.

The Court's resolution of the instant case flows from its deferential approach to the District Court's denial of petitioner's motion to add or substitute counsel; absent deference, a decision upholding the District Court's ruling would be inconceivable. Indeed, I believe that even under the Court's deferential standard, reversal is in order. The mere fact of multiple representation, as the Court concedes, will not support an order preventing a criminal defendant from retaining counsel of his choice. As this Court has stated on prior occasions, such representation will not invariably pose a substantial risk of a serious conflict of interest and thus will not invariably imperil the prospect of a fair trial. See *Cuyler* v. *Sullivan*, *supra*, at 346–348; *Holloway* v. *Arkansas*, 435 U. S. 475, 482–483 (1978). The propriety of the District Court's order thus depends on whether the Government showed that the particular facts and circumstances of the multiple representation proposed in this case were such as to overcome the presumption in favor of petitioner's choice of counsel. I believe it is clear that the Government failed to make this showing. Neither Eugene Iredale's representation of Juvenal Gomez-Barajas nor Iredale's representation of Javier Bravo posed any threat of causing a conflict of interest.

At the time of petitioner's trial, Iredale's representation of Gomez-Barajas was effectively completed. As the Court notes, Iredale had obtained an acquittal for Gomez-Barajas on charges relating to a conspiracy to distribute marijuana. Iredale also had negotiated an agreement with the Government under which Gomez-Barajas would plead guilty to charges of tax evasion and illegal importation of merchandise, although the trial court had not yet accepted this plea arrangement. Gomez-Barajas was not scheduled to appear as a witness at petitioner's trial; thus, Iredale's conduct of that trial would not require him to question his former client. The only possible conflict this Court can divine from Iredale's representation of both petitioner and Gomez-Barajas rests on the premise that the trial court would reject the negotiated plea agreement and that Gomez-Barajas then would decide to go to trial. In this event, the Court tells us, "petitioner's probable testimony at the resulting trial of Gomez-Barajas would create an ethical dilemma for Iredale." *Ante*, at 164.

This argument rests on speculation of the most dubious kind. The Court offers no reason to think that the trial court would have rejected Gomez-Barajas' plea agreement; neither did the Government posit any such reason in its argument or brief before this Court. The most likely occurrence at the time petitioner moved to retain Iredale as his defense counsel was that the trial court would accept Gomez-Barajas' plea agreement, as the court in fact later did. Moreover, even if Gomez-Barajas had gone to trial, petitioner probably would not have testified. The record contains no indication that petitioner had any involvement in or information about crimes for which Gomez-Barajas might yet have stood trial. The only alleged connection between petitioner and Gomez-Barajas sprang from the conspiracy to distribute marijuana, and a jury already had acquitted Gomez-Barajas of that charge. It is therefore disingenuous to say that representation of both petitioner and Gomez-Barajas posed a serious potential for a conflict of interest.

Similarly, Iredale's prior representation of Bravo was not a cause for concern. The Court notes that the prosecution intended to call Bravo to the stand at petitioner's trial and asserts that Bravo's testimony could well have "necessitat[ed] vigorous cross-examination . . . by petitioner's counsel." *Ibid.* The facts, however, belie the claim that Bravo's anticipated testimony created a serious potential for conflict. Contrary to the Court's inference, Bravo could not have testified about petitioner's involvement in the alleged marijuana distribution scheme. As all parties were aware at the time, Bravo did not know and could not identify petitioner; indeed, prior to the commencement of legal proceedings, the two men never had heard of each other. Bravo's eventual testimony at petitioner's trial related to a shipment of marijuana in which petitioner was not involved; the testimony contained not a single reference to petitioner. Petitioner's counsel did not cross-examine Bravo, and neither petitioner's counsel nor the prosecutor mentioned Bravo's testimony in closing argument. All of these developments were predictable when the District Court ruled on petitioner's request that Iredale serve as trial counsel; the contours of Bravo's testimony were clear at that time. Given the insignificance of this testimony to any matter that petitioner's counsel would dispute, the proposed joint representation of petitioner and Bravo did not threaten a conflict of interest.[3]

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[3] The very insignificance of Bravo's testimony, combined with the timing of the prosecutor's decision to call Bravo as a witness, raises a serious concern that the prosecutor attempted to manufacture a conflict in this case. The prosecutor's decision to use Bravo as a witness was an 11th-hour development. Throughout the course of plea negotiations with Bravo, the prosecutor never had suggested that Bravo testify at petitioner's trial. At Bravo's guilty-plea proceedings, when Iredale notified the District Court of petitioner's substitution motion, the prosecutor conceded

Moreover, even assuming that Bravo's testimony might have "necessitat[ed] vigorous cross-examination," the District Court could have insured against the possibility of any conflict of interest without wholly depriving petitioner of his constitutional right to the counsel of his choice. Petitioner's motion requested that Iredale either be substituted for petitioner's current counsel or be added to petitioner's defense team. Had the District Court allowed the addition of Iredale and then ordered that he take no part in the cross-examination of Bravo, any possibility of a conflict would have been removed. Especially in light of the availability of this precautionary measure, the notion that Iredale's prior representation of Bravo might well have caused a conflict of interest at petitioner's trial is nothing short of ludicrous.[4]

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that he had made no plans to call Bravo as a witness. Only after the prosecutor learned of the substitution motion and decided to oppose it did he arrange for Bravo's testimony by agreeing to recommend to the trial court a reduction in Bravo's sentence. Especially in light of the scarce value of Bravo's testimony, this prosecutorial behavior very plausibly may be viewed as a maneuver to prevent Iredale from representing petitioner at trial. Iredale had proved to be a formidable adversary; he previously had gained an acquittal for the alleged kingpin of the marijuana distribution scheme. As the District Court stated in considering petitioner's motion: "Were I in [petitioner's] position I'm sure I would want Mr. Iredale representing me, too. He did a fantastic job in that [Gomez-Barajas] trial . . . ." App. 124–125. The prosecutor's decision to call Bravo as a witness may well have stemmed from a concern that Iredale would do an equally fantastic job at petitioner's trial. As the Court notes, governmental maneuvering of this kind is relevant to a trial court's decision as to whether to accept a criminal defendant's chosen counsel. The significant possibility that the prosecutor was engaging in such bad-faith conduct provides yet another reason to dispute the Court's resolution of this case.

[4] The Court somewhat obliquely suggests that the timing of the motion to substitute or add Iredale as trial counsel helps to justify the District Court's ruling. See *ante*, at 155, 157, 163. I cannot agree. Iredale made clear to the District Court that notwithstanding the proximity of the scheduled trial date, he would neither need nor request a continuance of the trial were he substituted or added as defense counsel. The timing of petitioner's motion is therefore relevant only insofar as it affected the ability of the

The Court gives short shrift to the actual circumstances of this case in upholding the decision below. These circumstances show that the District Court erred in denying petitioner's motion to substitute or add Iredale as defense counsel. The proposed representation did not pose a substantial risk of a serious conflict of interest. The District Court therefore had no authority to deny petitioner's Sixth Amendment right to retain counsel of his choice. This constitutional error demands that petitioner's conviction be reversed. I accordingly dissent.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

This is not the first case in which the Court has demonstrated "its apparent unawareness of the function of the independent lawyer as a guardian of our freedom." *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 371 (1985) (STEVENS, J., dissenting) (footnote omitted). But even under the Court's paternalistic view of the citizen's right to select his or her own lawyer, its analysis of this case is seriously flawed. As JUSTICE MARSHALL demonstrates, the Court exaggerates the significance of the potential conflict. See *ante*, at 168–172. Of greater importance, the Court gives inadequate weight to the informed and voluntary character of the clients' waiver of their right to conflict-free representation. Particularly, the Court virtually ignores the fact that additional counsel representing petitioner had provided him with sound advice concerning the wisdom of a waiver and would have remained available during the trial to assist in the defense. Thus, this is not a case in which the District Judge faced the question whether one counsel should be substituted for another; rather the question before him

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District Court to consider the issues that the motion raised. The District Court itself believed that it had sufficient time to consider these issues. Far from denying the motion because of its timing, the District Court issued a decision on the merits after full briefing and oral argument.

was whether petitioner should be permitted to have *additional* counsel of his choice. I agree with JUSTICE MARSHALL that the answer to that question is perfectly clear.

Accordingly, although I agree with the Court's premise that district judges must be afforded wide latitude in passing on motions of this kind,* in this case it is abundantly clear to me that the District Judge abused his discretion and deprived this petitioner of a constitutional right of such fundamental character that reversal is required.

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*In my view, deference to the trial judge is appropriate in light of his or her greater familiarity with such factors as the ability of the defendant knowingly and voluntarily to waive a potential conflict (including the possibility that a codefendant may be exerting undue influence over the defendant), the character of the lawyers, the particular facts of the case, and the availability of alternative counsel of a like caliber.

GOODYEAR ATOMIC CORP. *v.* MILLER ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO

No. 86-1172. Argued January 19, 1988—Decided May 23, 1988

Appellee Miller, an employee of appellant at an Ohio nuclear production facility owned by the United States but operated by appellant, a private contractor, received a workers' compensation award from appellee Ohio Industrial Commission (Commission) for injuries sustained in a fall allegedly caused by a bolt protruding from the scaffold on which he was working. On the basis of a state safety regulation prohibiting scaffolds from having projecting parts, Miller then sought a supplemental award under a state constitutional provision authorizing such an award when an injury is caused by an employer's failure to comply with any specific state safety requirement. The Commission denied the claim, but the State Court of Appeals ordered the Commission to consider Miller's supplemental application. The State Supreme Court affirmed, ruling that federal law did not pre-empt Ohio from applying safety requirements unrelated to radiation hazards to nuclear facilities.

Held:

1. This Court has jurisdiction under 28 U. S. C. § 1257(2), since the Ohio Supreme Court upheld the application of the State's additional-award provision to the facility in question as against the contention that such application violated the Supremacy Clause of the Federal Constitution. Cf. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434. Application of the "pragmatic approach" utilized in *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 486, compels the conclusion that the state court's judgment was "final" within the meaning of § 1257(2) even though further proceedings before the Commission are anticipated, since the judgment finally determined the federal pre-emption question, and a reversal of that judgment would preclude any further proceedings. Moreover, even if appellant prevails before the Commission on nonfederal grounds, the State Supreme Court's unreviewed decision might seriously erode federal nuclear production policy by sanctioning direct state regulation of nonradiological hazards at the only facility producing nuclear fuel for the Navy, and has important implications for the regulation of federally owned nuclear production facilities in other States. Pp. 178–180.

2. The Supremacy Clause does not bar Ohio from applying its additional-award provision to a private contractor operating a federally owned nuclear production facility that performs a federal function.

Such facilities are shielded from direct state regulation, even though the federal function is carried out by a private contractor, unless Congress provides "clear and unambiguous" authorization for such regulation. *Hancock* v. *Train*, 426 U. S. 167. Even if the additional-award provision is sufficiently akin to direct state regulation to be potentially barred by the Supremacy Clause, 40 U. S. C. § 290—which empowers States to apply "workmen's compensation laws" to federal premises to the same extent as such laws are applied to private facilities—unambiguously provides the requisite clear congressional authorization for the application of the provision. The contention that the above-quoted, undefined phrase applies only to typical workers' compensation Acts and not to the additional-award provision cannot be squared with § 290's plain language, which places no express limitation on the type of workers' compensation scheme that is authorized, or with the statute's history, which demonstrates that, at the time of its enactment, a substantial number of States provided additional awards for violation of safety regulations, a matter of which Congress was presumably aware. The fact that, in enacting § 290, Congress rejected a proposal that would have authorized States to apply their safety and insurance laws directly to federal projects does not preclude, and is in fact consistent with, the allowance of additional-award provisions' incidental regulatory effects, which are significantly less intrusive than direct regulation on the operation of federal projects. Pp. 180–186.

26 Ohio St. 3d 110, 497 N. E. 2d 76, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, BLACKMUN, STEVENS, and SCALIA, JJ., joined. WHITE, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 186. KENNEDY, J., took no part in the consideration or decision of the case.

Robert E. Tait argued the cause and filed briefs for appellant.

Thomas W. Merrill argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Lauber*, *Richard G. Taranto*, and *Leonard Schaitman*.

Stewart R. Jaffy argued the cause for appellees. With him on the brief for appellee Miller were *Michael H. Gottesman*, *David M. Silberman*, and *Laurence Gold*. *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, and *Helen M.*

Ninos, *Dennis L. Hufstader*, and *Jeffery W. Clark*, Assistant Attorneys General, filed a brief for appellee Industrial Commission of Ohio.*

JUSTICE MARSHALL delivered the opinion of the Court.

The issue presented in this case is whether the Supremacy Clause bars the State of Ohio from subjecting a private contractor operating a federally owned nuclear production facility to a state-law workers' compensation provision that provides an increased award for injuries resulting from an employer's violation of a state safety regulation.

I

This case arises from an accident involving a worker at the Portsmouth Gaseous Diffusion Plant, a nuclear production facility located near Piketon, Ohio. The plant is owned by the United States, but at all times relevant to this action it was operated by a private company, appellant Goodyear Atomic Corporation, under contract with the Department of Energy (DOE). On July 30, 1980, appellee Esto Miller, a maintenance mechanic employed by Goodyear at the Portsmouth plant, fell from a scaffold while performing routine maintenance work and fractured his left ankle. His fall apparently was caused when his glove caught on a bolt protruding from the guardrail of the scaffolding. Miller applied to the Ohio Industrial Commission for an award under the State's workers' compensation program, for which Goodyear pays premiums to cover its Portsmouth employees. He received about $9,000 in workers' compensation.

After returning to work, Miller filed an application for an additional award on the ground that his injury had resulted from Goodyear's violation of a state safety requirement.

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*Briefs of *amici curiae* urging affirmance were filed for the National Conference of State Legislatures et al. by *Benna Ruth Solomon*, *Joyce Holmes Benjamin*, and *Beate Bloch;* and for the Oil, Chemical, and Atomic Workers International Union by *Donald J. Mares* and *John W. McKendree*.

Miller alleged that his fall was caused by Goodyear's failure to comply with Ohio Admin. Code § 4121:1–5–03(D)(2) (1987), which provides that "[e]xposed surfaces [on scaffolds] shall be free from sharp edges, burrs or other projecting parts." The Ohio Constitution provides that when an injury is caused by an employer's failure to comply with a specific state safety requirement, the Industrial Commission shall provide an additional award of 15% to 50% of the benefits already received. Ohio Const., Art. II, § 35. The state insurance fund recoups these additional payments by increasing the premium paid by the employer. *Ibid.*

The Ohio Industrial Commission denied Miller's claim for a supplemental award. The Commission held that "the [Ohio] Codes of Specific Safety Requirements . . . may not be applied to the Portsmouth Gaseous Diffusion Plant under the doctrine of federal preemption." Claim No. 80–19975 (Mar. 8, 1983), App. 18. Miller filed a mandamus action in the Ohio Court of Appeals, seeking an order directing the Industrial Commission to consider his application. The court held that "[u]ntil it is clear that the federal government has preempted the field of safety regulation for safety hazards unrelated to radiation, . . . state specific safety regulations that give rise to an award for violation thereof are equally applicable to an entity that contracts with the federal government for operation of a nuclear power facility owned exclusively by the federal government." No. 84AP–208 (July 25, 1985), App. 17. The court therefore ordered the Industrial Commission to consider Miller's claim that he was due an additional award because his injury was caused by a violation of a state safety regulation.

A divided Ohio Supreme Court affirmed the decision of the Court of Appeals. *State ex rel. Miller* v. *Ohio Industrial Comm'n*, 26 Ohio St. 3d 110, 497 N. E. 2d 76 (1986) *(per curiam)*. Relying on the federal pre-emption analysis of *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238 (1984), the court held that the Atomic Energy Act of 1954, 68 Stat. 919, as amended, 42 U. S. C. § 2011 *et seq.* (1982 ed. and Supp. IV), did not pre-empt Ohio from applying workers' compensation safety requirements unrelated to radiation hazards to nuclear facilities. 26 Ohio St. 3d, at 111–112, 497 N. E. 2d, at 77–78. In dissent, Justice Wright agreed with Goodyear's separate claim, not addressed by the majority, that in the absence of clearly expressed authorization from Congress, the Supremacy Clause barred the application of the state workers' compensation safety requirements to a federally owned facility. Justice Wright argued that Congress had not provided the necessary clear authorization to justify the application of the Ohio workers' compensation scheme. *Id.*, at 112–115, 497 N. E. 2d, at 78–80. We noted probable jurisdiction of Goodyear's appeal, 483 U. S. 1004 (1987), and now affirm the judgment of the Ohio Supreme Court on different reasoning.

II

Although neither party contests our appellate jurisdiction over this case, we must independently determine as a threshold matter that we have jurisdiction. See *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 305–306 (1962). Title 28 U. S. C. § 1257(2) gives this Court appellate jurisdiction over final judgments by the highest court of a State where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution and the decision is in favor of its validity. "[A] state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, 441 (1979). In this case, the additional-award provision of Ohio's workers' compensation statute, as applied to the Portsmouth facility, was drawn in question on the ground that it violated the Supremacy Clause, and the Ohio Supreme Court upheld the statute's application.

The more difficult question is whether the judgment is "final" within the meaning of 28 U. S. C. § 1257(2), even though further proceedings are anticipated before the Ohio Industrial Commission. The judgment of the Ohio Supreme Court requires that the Industrial Commission consider appellee's claim that his injury was caused by a failure to comply with a state safety regulation. In *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975), we recognized four situations in which this Court views a judgment as final under § 1257(2) although further state proceedings are contemplated. In the fourth category are cases

> "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.*, at 482–483.

We believe the present case falls within this fourth category. The federal question whether the additional workers' compensation award is barred by federal law has been finally determined by the Ohio Supreme Court, and a reversal of the Ohio Supreme Court's holding would preclude any further proceedings. In addition, even if appellant prevails before the Industrial Commission on nonfederal grounds, for example, if the Commission determines that there was no violation of the state safety regulation, the unreviewed decision of the Ohio Supreme Court might seriously erode federal policy in the area of nuclear production. The federal pre-emption analysis of the Ohio court sanctions direct state regulation of nonradiological hazards at the Portsmouth facility, the only nuclear facility producing nuclear fuel for the Navy's nuclear fleet. Moreover, the decision has important implications for the regulation of federally owned nuclear production facilities in other States. Following our "pragmatic approach" to the question of finality, *Cox Broadcasting Corp.* v. *Cohn*, *supra*, at 486, we therefore conclude that the Ohio decision on the federal issue is a final judgment for purposes of 28 U. S. C. § 1257(2).

III

It is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides "clear and unambiguous" authorization for such regulation. *EPA* v. *State Water Resources Control Board*, 426 U. S. 200, 211 (1976); accord, *Hancock* v. *Train*, 426 U. S. 167, 178–179 (1976); *Mayo* v. *United States*, 319 U. S. 441, 445 (1943). As an initial matter, therefore, we consider whether the federally owned Portsmouth facility is likewise shielded from direct state regulation even though the facility is operated by a private party under contract with the United States.[1] We believe this question was answered in *Hancock* v. *Train*, 426 U. S., at 168, in which we faced the issue whether a State could enforce its pollution emission limitations against "federally owned or operated installations" by requiring that such installations obtain a state permit. One of the facilities at issue in *Hancock* was the Paducah Gaseous Diffusion Plant, which, like the Portsmouth facility, is a federally owned nuclear production facility operated by a private contractor. *Id.*, at 174, n. 23. Nuclear production facilities such as the Paducah and Portsmouth plants are authorized by statute to carry out a federal mission, with federal property, under federal control.[2] The Court struck down the permit requirement in *Hancock*, reasoning that without clear congressional authorization, "'the federal function must be left free' of [state] regulation." *Id.*, at 179, quoting *Mayo* v. *United States*, *supra*, at 447. *Hancock* thus establishes that a federally owned facility performing a federal function is shielded from direct state regulation, even though the federal function is carried out by a private contractor, unless Congress clearly authorizes such regulation.[3]

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[1] The Ohio Supreme Court in this case failed to consider the fundamental distinction between state regulation of private facilities and state regulation of federal facilities. When dealing with state regulation of private facilities, analysis under the Supremacy Clause centers on whether Congress has taken affirmative action to pre-empt the state regulation in question. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 712–713 (1985). On the other hand, because the Supremacy Clause immunizes the activities of the Federal Government from state interference, *Mayo* v. *United States*, 319 U. S. 441, 445 (1943), direct state regulation of federal facilities is allowed only to the extent that Congress has clearly authorized such regulation.

In this case, however, we are not presented with a direct state regulation of the operation of the Portsmouth facility. Rather, the case involves the imposition of a supplemental award of workers' compensation, chargeable against Goodyear, for an injury caused by Goodyear's failure to comply with a state safety regulation. Appellant and the Solicitor General argue that the application of the Ohio additional award provision is nonetheless tantamount to a regulation of the Portsmouth facility and is thus invalid under the Supremacy Clause. We need not decide this issue, however, for we conclude that even if the provision is sufficiently akin to direct regulation of the Portsmouth facility to be potentially barred by the Supremacy Clause, ch. 822, 49 Stat. 1938, 40 U. S. C. § 290, provides the requisite clear congressional authorization for the application of the provision to workers at the Portsmouth facility.

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[2] With certain limited exceptions, the DOE, as agent of the United States, is the exclusive owner of all nuclear production facilities. See 42 U. S. C. § 2061(a); see also Department of Energy Organization Act, 91 Stat. 577, 42 U. S. C. § 7151(a) (transferring responsibility to DOE from the Energy Research and Development Administration). The DOE is authorized to contract with private parties to operate its facilities, but these private contractors are subject to the direction and supervision of the DOE. See 42 U. S. C. § 2061(b); H. R. Rep. No. 2181, 83d Cong., 2d Sess., 14 (1954) ("In connection with its own production facilities, . . . the Commission is permitted to have the actual operation carried on by other persons under contract to it and under its direction and control"). This federal control over the production of nuclear material is an important aspect of federal nuclear energy policy. See 42 U. S. C. § 2013(c).

[3] Appellees and *amici* argue that *Hancock* should be read as applying only to situations in which the state regulation may act to prohibit the operation of the federally owned facility. Although *Hancock* involved a state regulation requiring an operating permit, the central issue presented was the power of the State to enforce its emissions regulations. See *Hancock* v. *Train*, 426 U. S., at 181. Under the Supremacy Clause, we discern no important difference between the authority to order compliance with state regulations and the authority to require a permit prior to operating a facility. In both settings the State is claiming the authority to dictate the manner in which the federal function is carried out.

Section 290 provides in relevant part:

> "Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be."[4]

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[4] Although the language and history of § 290 indicate that it is addressed to federal enclaves, areas over which the United States has assumed exclusive jurisdiction under U. S. Const., Art. I, § 8, cl. 17, see S. Rep. No. 2294, 74th Cong., 2d Sess. (1936), both appellant and the Solicitor General concede, and we agree, that it authorizes the application of workers'

Both appellant and the Solicitor General concede that the initial workers' compensation award received by respondent Miller is authorized by § 290. They contend, however, that § 290 does not authorize the supplemental award provided in Ohio's workers' compensation law when an employer violates a specific state safety regulation. At bottom, appellant and the Solicitor General argue that the phrase "workmen's compensation laws" in § 290, which is not defined, was not intended to include the additional-award provision in Ohio's workers' compensation law. Appellant claims that in the absence of a precise definition, we should infer that Congress envisioned the typical workers' compensation Act, under which workers are automatically entitled to certain benefits when they suffer a work-related injury, without regard to the employer's fault. A State's authority to enforce its workers' compensation laws under § 290, appellant continues, should be limited to such standard awards.

We do not believe appellant's construction of § 290 can be squared with the statute's language and history. Section 290 provides that a state authority charged with enforcing "workmen's compensation laws," which in Ohio is the Industrial Commission, "shall have the power and authority to apply such laws" to federal premises "in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State." This language places no express limitation on the type of workers' compensation scheme that is authorized.[5] On its face, § 290 compels the same workers'

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compensation laws to federal facilities like the Portsmouth plant that are not federal enclaves.

[5] There is no doubt that the supplemental award provision is an integral part of the Ohio workers' compensation statute. The provision was enacted in 1923 as an amendment to the existing workers' compensation scheme. The amendment abolished the right to bring an action at law when the employer failed to comply with specific safety requirements and substituted the additional percentage award in the event of such a failure. *State ex rel. Bailey* v. *Krise*, 18 Ohio St. 2d 191, 195–197, 249 N. E. 2d 55, 58–59 (1969).

compensation award for an employee injured at a federally owned facility as the employee would receive if working for a wholly private facility. In addition, at the time of the passage of § 290 in 1936, workers' compensation laws provided a wide variety of compensation schemes that do not fit neatly within appellant's view of the "typical" scheme. At least 15 States provided remedies in addition to basic workers' compensation awards when an employee was injured because of specified kinds of employer misconduct.[6] Eight of these States, including Ohio, provided supplemental awards when the employer violated a specific safety regulation.[7] We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts. See *Director, OWCP* v. *Perini North River Associates*, 459 U. S. 297, 319–320 (1983). In the absence of affirmative evidence in the language or history of the statute, we are unwilling to assume that Congress was ignorant of the substantial number of States providing additional workers' compensation awards when a state safety regulation was violated by the employer. Indeed, Congress appears to have recognized the diversity of workers' compensation schemes when it provided that workers' compensation would be awarded to workers on federal premises "in the same way and to the same extent" as provided by state law. The meaning of "workmen's compensation laws" in § 290, of course, is not infinitely elastic. We need not address the outer boundaries of that term in this case, however, because we believe it is clear that Congress intended Ohio's law and others of its ilk, which were solidly entrenched at the time of the enactment of § 290, to apply to federal facilities "to the same extent" that they apply to private facilities within the State.

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[6] See 1925 Ariz. Sess. Laws, ch. 83, § 65 (option to sue if injury from employer's "wilful misconduct"); 1917 Cal. Stats., ch. 586, § 6(b) (50% increase in compensation, not to exceed $2,500, if injury caused by serious and willful misconduct of employer); 1916 Ky. Acts, ch. 33, §§ 3, 29 (option to sue for intentional injury and 15% increase for intentional failure to comply with statute); 1911 Mass. Acts, ch. 751, pt. 2, § 3 (100% increase if injury caused by employer's serious and willful misconduct); 1925 Mo. Laws, § 3 (15% increase for failure to comply with any statute); 1929 N. M. Laws, ch. 113, § 7 (50% increase if employer fails to provide safety devices required by law); 1929 N. C. Sess. Laws, ch. 120, § 13 (10% increase for willful failure to comply with any statutory requirement); Ohio Const., Art. 2, § 35 (15% to 50% increase for violation of specific safety requirement); 1921 Ore. Laws, ch. 311, § 6 (option to sue for intentional injury by employer); 1936 S. C. Acts, No. 610, § 13 (10% increase for willful failure to comply with statute); 1917 Tex. Gen. Laws, ch. 103, § 5 (option to sue for "willful act or omission" or "gross negligence" of employer); 1921 Utah Laws, ch. 67, § 1 (15% increase for willful failure to comply with any statute); 1911 Wash. Laws, ch. 74, § 6 (option to sue for intentional injury); 1913 W. Va. Acts, ch. 10, § 28 (option to sue for intentional injury); 1915 Wis. Laws, ch. 378, § 1(*h*) (15% increase for violation of statute); see also 2A A. Larson, Law of Workmen's Compensation § 69.10 (1987).

[7] See 1916 Ky. Acts, ch. 33, § 29; 1925 Mo. Laws § 3; 1929 N. M. Laws, ch. 113, § 7; 1929 N. C. Sess. Laws, ch. 120, § 13; Ohio Const., Art. II, § 35; 1936 S. C. Acts, No. 610, § 13; 1921 Utah Laws, ch. 67, § 1; 1915 Wis. Laws, ch. 378, § 1(*h*). For the present versions of these laws, see Ky. Rev. Stat. § 342.165 (1983); Mo. Rev. Stat. § 287.120(4) (1986); N. M. Stat. Ann. § 52–1–10(B) (1978); N. C. Gen. Stat. § 97–12 (1985); Ohio Const., Art. II, § 35; S. C. Code § 42–9–70 (1976); Utah Code Ann. § 35–1–12 (1953); Wis. Stat. § 102.57 (1985–1986).

The only evidence in the legislative history of § 290 that appellant and the Solicitor General muster in support of their position is that Congress rejected a proposal that would have authorized States to apply state safety and insurance laws directly to federal projects. See S. Rep. No. 2294, 74th Cong., 2d Sess., 2 (1936). But Congress' reluctance to allow direct state regulation of federal projects says little about whether Congress was likewise concerned with the incidental regulatory effects arising from the enforcement of a workers' compensation law, like Ohio's, that provides an additional award when the injury is caused by the breach of a safety regulation. The effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of such an additional award provision. Appellant may choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation. We believe Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not.[8] Cf. *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S., at 256 (Congress was willing to accept regulatory consequences of application of state tort law to radiation hazards even though direct state regulation of safety aspects of nuclear energy was pre-empted). Because the permission of incidental regulation is consistent with the preclusion of direct regulation, the legislative history relied on by appellant and the Solicitor General does not undermine the plain language of § 290. We conclude that the additional award provision of Ohio's workers' compensation law is unambiguously authorized by § 290 and therefore does not run afoul of the Supremacy Clause.[9] Accordingly, the judgment of the Ohio Supreme Court is affirmed.

It is so ordered.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

The Court's seminal decision in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), establishes the principle that the

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[8] Prior to enacting § 290, Congress had authorized recovery of damages under state tort law by persons injured or killed on federal enclaves. See ch. 15, 45 Stat. 54, 16 U. S. C. § 457. Thus, at the time § 290 was enacted, Congress already had evinced a willingness to have state law exert incidental regulatory pressures on federal facilities.

[9] Appellant also argues that the Atomic Energy Act of 1954, 68 Stat. 919, as amended, 42 U. S. C. § 2011 *et seq.* (1982 ed. and Supp. IV), and the DOE's health and safety regulations promulgated under the 1954 Act, pre-empt the award of additional compensation based on state health and safety regulations. Nothing in the 1954 Act, however, expresses an intent to repeal § 290 as applied to nuclear production facilities, nor can we read the 1954 Act as implicitly repealing § 290 because the two are not inconsistent. Section 290 is therefore as effective an authorization to apply state workers' compensation laws after the passage of the 1954 Act as before.

States may not exercise their sovereign powers so as to control those instrumentalities of the United States which have been judged necessary and proper to carry into effect federal laws and policies. Although the narrow issue in that case involved only the assertion by the State of Maryland of its power to tax a federal bank, the Court laid down a more general construction of the Supremacy Clause that has proved to be enduring in its force of reason. As the Court stated: "The attempt to use [state sovereign power] on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give." *Id.*, at 430. The contrary principle would be "capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States." *Id.*, at 432. "The result," the Court concluded, "is a conviction that the States have no power, by taxation *or otherwise*, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *Id.*, at 436 (emphasis added).

Although, again, the narrow issue in *McCulloch* concerned only the power to tax, which as the Court noted "involves the power to destroy," *id.*, at 431, the passages quoted above demonstrate that the decision was formulated, explicitly, with sufficient breadth to apply to other measures a State might impose that would "retard, impede, burden, or in any manner control" the operations of federal instrumentalities. *Id.*, at 436. And, clearly, the power to regulate also involves "the power to destroy" if the regulatory web is spun too tightly around its object. More commonly, however, the additional and perhaps conflicting regulations imposed by a

State would simply burden the federal instrumentality, interfere with its operations, and frustrate the federal objectives it is designed to achieve. Nonetheless, the law has long been settled that such regulation cannot be imposed on federal instrumentalities by the States, under the Supremacy Clause, unless the Federal Government directly indicates that it finds such impositions to be consistent with the proper pursuit of its powers under federal law. *Hancock* v. *Train*, 426 U. S. 167, 178–179 (1976); *Mayo* v. *United States*, 319 U. S. 441, 447–448 (1943).

In this case the State of Ohio seeks to require a federal nuclear facility, which all concede to be the equivalent of any other federal instrumentality,[1] to make a "bonus" money payment to workers who are injured when the injury results from the facility's failure to comply with "any specific [state] requirement for the protection of the lives, health or safety of employees." Ohio Const., Art. II, §35. Although the Court declines to decide whether this provision of state law is tantamount to a regulation of the facility or to some similarly impermissible imposition upon it, *ante*, at 182, I believe that no other view is tenable on the facts before us.

Initially, the proper focus under the Supremacy Clause is not the avowed purpose for which the State adopts a given provision but the actual effect of the provision on the operation of a federal instrumentality and on its ability to achieve the objectives of federal law and policy for which it has been created. *Perez* v. *Campbell*, 402 U. S. 637, 651–652 (1971). The Court has held that even the general framework of state workers' compensation laws may not be applied at places that lie within the exclusive jurisdiction of the Federal Government. *Murray* v. *Gerrick & Co.*, 291 U. S. 315 (1934). And yet the provision of Ohio law at issue in this case is much more specific in its application, and in its regulatory effect upon this federal facility, than is the general framework of such laws. The basic feature of the state statutory regimes for the compensation of workers is that the common law governing the relationship between employer and employee, whose doctrines had become so disadvantageous to employees, is replaced by an automatic entitlement of the employee to certain benefits when injured in the course of employment. See 1 A. Larson, Law of Workmen's Compensation §§1.10–3.40 (1985). Unlike this basic scheme, however, which does not pressure the federal facility to alter its operations in any specific respect to comply with particular state regulations, the Ohio law exposes the facility to a special penalty if it does not comply with "any specific [state] requirement for the protection of the lives, health or safety of employees." Ohio Const., Art. II, §35. The specificity of these requirements is much more intrusive on the management of the federal facility than even a state workers' compensation law that would preserve the employee's right to sue the employer for willful misconduct or for intentional injury, as do the laws of several States. In terms of the regulatory impact on the federal instrumentality, it is one thing for the facility to know that it should manage its operations so as to minimize the risk of injuries to its employees; it is quite another to expose it to money penalties for failing to comply with the whole panoply of specific state regulations that dictate precise rules to govern very detailed aspects of employee health and safety.

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[1] The Court recognizes, *ante*, at 180–181, and I agree, that under our precedents the facility here, which is federally owned but is operated by a private party under contract with the Federal Government, must be treated as a federal instrumentality for the purpose of applying the Supremacy Clause. *Hancock* v. *Train*, 426 U. S. 167, 174, n. 23 (1976).

It is quite obvious that an attempt by the State of Ohio to impose these same kinds of specific regulations on the federal facility, directly, by obliging the facility to satisfy them all or else to suspend operations, would run afoul of the Supremacy Clause. The rule at issue here has a similar effect. Appellees claim that the federal facility violated a provision in the code of safety requirements, which the State of Ohio has adopted by administrative rule. The provision sets out specific restrictions on mobile work platforms and rolling platforms, and says that "[e]xposed surfaces shall be free from sharp edges, burrs or other projecting parts." Ohio Admin. Code § 4121:1–5–03(D)(2) (1987). There are thousands of such requirements in the administrative rules adopted by the Ohio Industrial Commission's Division of Safety and Hygiene, which in their current version run to well over 200 double-columned pages of meticulous prescriptions, illustrated in minute detail with diagrams, graphs, and charts, see Ohio Admin. Code, ch. 4121:1 (1987), and there are countless other specific requirements in the State's other laws and regulations. It will not do to say that the State of Ohio has not attempted to regulate this facility directly, but simply has exposed it to possible money payments for failure to comply with these specific requirements, since such requirements are often enforced by fines rather than by enjoining specific conduct, and in any event the apparent means of enforcing all of these rules is through the workers' compensation awards permitted under state law.

Nor does it make sense to say that the State of Ohio is not fining the facility, but is only penalizing it in the form of additional compensation to injured workers. It cannot matter that the extra payment is made only in the event of an actual injury; one might just as well argue that a regulatory fine would not be a burden if it were imposed not every day but only on the less frequent occasions when inspections are held. Even more to the point, if the amount of the money penalty were very large, the direct compulsion that would be brought to bear upon the federal facility to knuckle under and scrutinize its operations for compliance with every jot and tittle of the state administrative rules is apparent. The case is no different because the amount of the extra "bonus" award in any given instance may be small. In *Ohio* v. *Thomas*, 173 U. S. 276 (1899), the contested provision involved nothing more than whether the person in charge of an eating house at a federal home for disabled veterans was required under state law to put out a small printed sign that would read "oleomargarine sold and used here" when he served oleomargarine to the inmates. The state law was found to be invalid as applied to the federal facility, under the Supremacy Clause, without regard to the plain fact that the contested imposition was such a slight one, for the *principle* remains the same in such a case.[2]

The mechanics of the Ohio provision, as interpreted by the Ohio courts, reinforce both the obvious regulatory effect of this state law and the important differences between such a provision and a basic workers' compensation scheme. First, unlike workers' compensation, which provides an award to every employee who is injured on the job regardless of how the injury occurred, the additional payment here is only available when the facility fails to comply with a state regulatory "requirement." Even the regulatory provisions embodied in federal laws and rules have been held not to activate the extra money penalty afforded by state law. See, *e. g.*, *State ex rel. Ish* v. *Industrial Comm'n*, 19 Ohio St. 3d 28, 482 N. E. 2d 941 (1985); *State ex rel. Roberts* v. *Industrial Comm'n*, 10 Ohio St. 3d 1, 460 N. E. 2d 251 (1984). Second, the necessity that the state requirement be "specific" in its dictates has been strictly construed. It "does not comprehend a general course of conduct or general duties or obligations flowing from the relation of employer and employee, but embraces such lawful, specific and definite requirements or standards of conduct as are prescribed by statute or by orders of the Industrial Commission." *State ex rel. Trydle* v. *Industrial Comm'n*, 32 Ohio St. 2d 257, 291 N. E. 2d 748,

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[2] If this point is thought to matter, however, it is worth noting that Ohio's penalty scheme allows for larger money payments than does any other State. 2A A. Larson, Law of Workmen's Compensation § 69.10 (1987). The penalty award at issue in this case would amount to somewhere between $1,328 and $4,429. Brief for Appellee Miller 3, n. 4.

750 (1972). The question whether a particular safety requirement is sufficiently "specific" to support an extra money penalty has often been litigated in the Ohio courts, and such awards are invalidated unless the claimant is able to demonstrate that the specific requirement "demands that some particular and definite act or thing be done." *State ex rel. Holdosh* v. *Industrial Comm'n*, 149 Ohio St. 179, 181–182, 78 N. E. 2d 165, 166 (1948). See also *State ex rel. Rae* v. *Industrial Comm'n*, 136 Ohio St. 168, 24 N. E. 2d 594 (1939); *Trydle, supra; State ex rel. Jack Conie & Sons Corp.* v. *Industrial Comm'n*, 56 Ohio St. 2d 150, 382 N. E. 2d 1366 (1978). In order to secure the penalty award, the employee must show that the regulatory requirement is "definite" in the sense that it leaves *no discretion* to the employer—does not make it at all "a matter of his own choosing"—how to comply with the specific requirement. *State ex rel. Fast & Co.* v. *Industrial Comm'n*, 176 Ohio St. 199, 201, 198 N. E. 2d 666, 667 (1964).

Since this provision of Ohio law exacts a monetary penalty only for failure to comply with state laws and regulations, and indeed only for failure to comply with those state regulations which are so specific that they dictate precisely what steps the employer must take to avoid this increased financial exposure, the principal effect of this provision can only be to induce the employer to adhere to each of the various health and safety regulations that the State has adopted. And therefore the impact of such a provision on a federal instrumentality presents a very different problem, for purposes of analysis under the Supremacy Clause, from that posed by the mere application of a state workers' compensation scheme.

The Court today skirts these difficulties and rests its disposition on the view that, no matter how extensive the actual regulatory effect of this state law may be, Congress has sanctioned its application to federal instrumentalities by enacting 40 U. S. C. § 290. The Court finds in this statute the "unambiguous" and "clear congressional mandate" approving such state regulation that we have required in past cases. *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 122 (1954); *EPA* v. *State Water Resources Control Board*, 426 U. S. 200, 211 (1976). I disagree.

Section 290 authorizes each State to apply its "workmen's compensation laws" to all "property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State." The crux of the matter is whether Congress intended by this provision to open up all federal instrumentalities to the kind of potentially onerous regulation of their operations that is imposed by the Ohio provision for money penalties. I do not believe that in authorizing the States to apply these compensation laws to federal instrumentalities "in the same way and to the same extent" as they apply to other employers, Congress had any purpose to expose federal establishments to coercive financial pressure to comply with a slew of detailed state regulations about how to carry on their operations. Nothing in the statute or its background suggests that Congress had such an intent, and certainly nothing at all suggests that any such position was "clearly" or "unambiguously" approved by Congress. I am unimpressed by the fact that a small fraction of the States permitted such additional awards at the time § 290 was passed; if the "clear congressional mandate" approving such state regulations cannot be found in the federal statute itself, then the obscure practices of a few States at the time of enactment will not suffice to create one. Congress need not explicitly disapprove every contrary aspect of the workers' compensation laws of the several States in order to refrain from giving them its "unambiguous" blessing.

Section 290 was enacted in response to the Court's decision in *Murray* v. *Gerrick & Co.*, 291 U. S. 315 (1934), which had held that state workers' compensation laws may not be applied at all in areas under the exclusive jurisdiction of the Federal Government. The purpose of the bill as stated was simply the humanitarian one of "correcting this situation," in which workers employed on federal projects were deprived of the benefits of coverage purely because of an oddity of location. S. Rep. No. 2294, 74th Cong., 2d Sess., 2 (1936); H. R. Rep. No. 2656, 74th Cong., 2d Sess., 1 (1936). As the Senate Report explained at greater length: "The purpose of the amended bill is to fill a conspicuous gap in the workmen's compensation field by furnishing protection against death or disability to laborers and mechanics employed by contractors or other persons on Federal property." S. Rep. No. 2294, at 1.

That Congress intended nothing more than to provide much-needed coverage to these workers is shown by the single revealing item in the scanty legislative history of the statute. The House version of the bill not only would have extended coverage to these workers, but also would have subjected federal property to state safety and insurance regulations and would have authorized state officers to enter upon federal premises in furtherance of these aims. The Senate struck out these latter provisions at the request of the Executive Branch of the Federal Government, noting expressly that they "would not only produce conflicts of authority between State and Federal officers but would also mark a wide departure from the well-established principle that Federal officers should have complete charge of any regulations pertaining to Federal property." S. Rep. No. 2294, at 2. As no such departure from normal practice was intended by Congress, the Senate version of the bill was enacted.

This background to the enactment of § 290 shows that Congress did not intend to expose federal instrumentalities to the kind of detailed and mandatory regulation that is provided by the Ohio law at issue in this case. The Court's response on this point is simply to assert that "[t]he effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of such an additional award provision." *Ante*, at 185. In some instances the Court may be correct that the effects of direct regulation could be more intrusive than a provision for penalty awards, but the question here is not whether these two things are exactly the same, but simply whether the "regulatory effects" of the penalty provision, which as set out above are far from "incidental," are the kinds of effects that Congress did not intend to sanction when it enacted § 290. These effects are clearly impermissible under the rationale that the Senate articulated for removing from the bill the two obnoxious provisions that had been included in the House version. And even if I were to conclude that Congress had acted ambiguously on this score, I would at least be forced to conclude that Congress offered no "clear" or "unambiguous" mandate for the kind of specific regulatory compulsion that this Ohio law exerts upon this federal facility.

I therefore respectfully dissent.

BUDINICH *v.* BECTON DICKINSON & CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 87–283. Argued March 21, 1988—Decided May 23, 1988

In petitioner's employment compensation action, which respondent removed from a Colorado state court to the Federal District Court on the basis of diversity of citizenship, judgment was entered on the jury's verdict for petitioner in an amount considerably less than he had sought. Petitioner timely filed new-trial motions and a motion for attorney's fees under Colorado law. On May 14, 1984, the court denied the new trial motions but found that petitioner was entitled to attorney's fees, and, on August 1, 1984, entered a final order determining the amount of the fees. On August 29, petitioner filed notice of appeal to the Court of Appeals, covering all of the District Court's post-trial orders. Although affirming the attorney's fees award, the court granted respondent's motion to dismiss as to all other issues on the grounds that the judgment was final and immediately appealable upon entry of the May 14 order denying the new-trial motions, and that the appeal notice was not filed within 30 days of that order as required by Federal Rules of Appellate Procedure 4(a)(1) and (4).

Held:

1. The question whether the District Court's decision on the merits was appealable before the attorney's fees determination was made is governed by federal law—specifically 28 U. S. C. § 1291, which provides that all district court "final decisions" are appealable to the courts of appeals—and not by Colorado law. Although state law generally supplies the rules of decision in federal diversity cases, it does not control the resolution of issues governed by federal statute. The contention that the application of § 1291 to diversity cases would violate the Tenth Amendment to the Federal Constitution is without merit, since § 1291 is "rationally capable of classification" as a procedural rule, and is therefore necessary and proper for implementing Congress' Art. III, § 1, power to establish federal courts. *Hanna* v. *Plumer*, 380 U. S. 460, 472. Pp. 198–199.

2. A decision on the merits is a "final decision" for purposes of § 1291, and is therefore immediately appealable, even though the recoverability or amount of attorney's fees for the litigation remains to be determined. The merits order ends the litigation on the merits, and the remaining fees question does not prevent finality, since it is collateral to, and sepa-

rate from, the order, and resolution of it cannot alter or amend the order or moot any decisions that the order embodies. According different treatment to attorney's fees when they are deemed part of the merits recovery by statutory or decisional law (as petitioner claims is the case in Colorado) would not serve § 1291's purposes, and would disserve the interests of courts and litigants because, since the merits or nonmerits status of a fee provision is often unclear, the issue of finality and hence the jurisdictional time for appeal would be left in doubt. The argument that the Court of Appeals' decision constitutes a significant change in the law and therefore should be applied only prospectively cannot avail petitioner, since, regardless of whether such a change has occurred, the untimely filed notice of appeal did not give the court jurisdiction to review the merits decision. Pp. 199–203.

807 F. 2d 155, affirmed.

SCALIA, J., delivered the opinion for a unanimous Court.

Thomas D. Frank argued the cause and filed a brief for petitioner.

Terre Lee Rushton argued the cause for respondent. With her on the brief was *Donald R. Ware*.

JUSTICE SCALIA delivered the opinion of the Court.

Petitioner brought this action in Colorado state court to recover employment compensation allegedly due. Respondent removed the case to the United States District Court for the District of Colorado on the basis of diversity of citizenship. 28 U. S. C. §§ 1332, 1441. A jury awarded petitioner a verdict of $5,000 (considerably less than had been sought), and judgment was entered on March 26, 1984. Petitioner timely filed new-trial motions, challenging various rulings by the District Court, and a motion for attorney's fees. (Colorado law provides that in a suit to collect compensation due from employment "the judgment . . . shall include a reasonable attorney fee in favor of the winning party, to be taxed as part of the costs of the action." Colo. Rev. Stat. 8–4–114 (1986).) On May 14, 1984, the District Court denied the new-trial motions, found that petitioner was entitled to attorney's fees, and requested further briefing and documentation before determining their amount. The District Court issued its final order concerning the attorney's fees on August 1, 1984. On August 29, petitioner filed notice of appeal to the Court of Appeals for the Tenth Circuit, covering all the District Court's post-trial orders.

Respondent filed a motion to dismiss the appeal, arguing that the judgment was final and immediately appealable when the order denying the new-trial motions was entered May 14, 1984, and that the notice of appeal was not filed within 30 days of that order as required by Federal Rules of Appellate Procedure 4(a)(1) and (4). The Court of Appeals granted the motion to dismiss as to all issues except the award of attorney's fees, which it affirmed. We granted certiorari, 484 U. S. 895 (1987), to resolve a conflict in the Courts of Appeals. Compare, *e. g.*, *Holmes* v. *J. Ray McDermott & Co.*, 682 F. 2d 1143, 1146 (CA5 1982), cert. denied, 459 U. S. 1107 (1983), with, *e. g.*, *International Assn. of Bridge, Structural, Ornamental, and Reinforcing Ironworkers' Local Union 75* v. *Madison Industries, Inc.*, 733 F. 2d 656, 658 (CA9 1984).

It is common ground in this case that if the District Court's decision on the merits was appealable before its determination of attorney's fees, then the merits appeal was untimely. See Fed. Rules App. Proc. 4(a)(1), (4), (6); Fed. Rules Civ. Proc. 54(a), 58. Petitioner contends that Colorado law governs this question and that "[u]nder Colorado law a claim is not final and appealable until attorneys fees are fully determined." Brief for Petitioner 13. We do not agree that Colorado law governs.

Although state law generally supplies the rules of decision in federal diversity cases, see 28 U. S. C. § 1652; *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78 (1938), it does not control the resolution of issues governed by federal statute, see U. S. Const., Art. VI, cl. 2 (Supremacy Clause); 28 U. S. C. § 1652; *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 404–405 (1967). Under 28 U. S. C. § 1291, "all final decisions of the district courts" are appealable to the courts of appeals. In using the phrase "final decisions" Congress obviously did not mean to borrow or incorporate state law. "Final decisions" is not a term like "property," which naturally suggests a reference to state-law concepts, cf. *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972); and the context of its use in § 1291 makes such a reference doubly implausible, since that provision applies to all federal litigation and not just diversity cases. Nor is it possible to accept petitioner's contention that § 1291 does not apply to diversity cases because that would violate the Tenth Amendment to the Constitution. We have held that enactments "rationally capable of classification" as procedural rules are necessary and proper for carrying into execution the power to establish federal courts vested in Congress by Article III, § 1. *Hanna* v. *Plumer*, 380 U. S. 460, 472 (1965); see also *Burlington Northern R. Co.* v. *Woods*, 480 U. S. 1, 5, and n. 3 (1987). A statute mandating when an appeal may be taken from one federal court to another certainly meets this test. Cf. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949) (treating appealability as an issue of federal law in a case brought under diversity jurisdiction).

The question before us, therefore, is whether a decision on the merits is a "final decision" as a matter of federal law under § 1291 when the recoverability or amount of attorney's fees for the litigation remains to be determined. "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U. S. 229, 233 (1945). A question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order. See, *e. g.*, *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 308–309 (1962); *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, 513–516 (1950). We have all but held that an attorney's fees determination fits this description. In *White* v. *New Hampshire Dept. of Employment Security*, 455 U. S. 445 (1982), we held that a request for attorney's fees under 42 U. S. C. § 1988 is not a motion "to alter or amend the judgment" within the meaning of Federal Rule of Civil Procedure 59(e) because it does not seek "reconsideration of matters properly encompassed in a decision on the merits." 455 U. S., at 451. This holding was based on our conclusion that "a request for attorney's fees under § 1988 raises legal issues collateral to" and "separate from" the decision on the merits. *Id.*, at 451–452. We went so far as to observe in dicta that "[t]he collateral character of the fee issue establishes that an outstanding fee question does not bar recognition of a merits judgment as 'final' and 'appealable.'" *Id.*, at 452–453, n. 14. See also *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 170 (1939) (observing that a petition for attorney's fees in equity is "an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree").

The foregoing discussion is ultimately question-begging, however, since it assumes that the order to which the fee issue was collateral *was* an order ending litigation on the merits. If one were to regard the demand for attorney's fees as *itself* part of the merits, the analysis would not apply. The merits would then not have been concluded, and § 1291 finality would not exist. See *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U. S. 737, 740–742 (1976). As a general matter, at least, we think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain. Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending against the action. At common law, attorney's fees were regarded as an element of "costs" awarded to the prevailing party, see 10 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure: Civil § 2665 (1983), which are not generally treated as part of the merits judgment, cf. Fed. Rule Civ. Proc. 58 ("Entry of the judgment shall not be delayed for the taxing of costs"). Many federal statutes providing for attorney's fees continue to specify that they are to be taxed and collected as "costs," see *Marek* v. *Chesny*, 473 U. S. 1, 43–48 (1985) (BRENNAN, J., dissenting) (citing 63 such statutes)—as does, in fact, the Colorado statute at issue here.

Petitioner contends, however, that the general status of attorney's fees for § 1291 purposes must be altered when the statutory or decisional law authorizing them makes plain (as he asserts Colorado law does) that they are to be part of the merits judgment. This proposition is not without some support. Some Courts of Appeals have held that the statutes creating liability for attorney's fees can cause them to be part of the merits relief for purposes of § 1291. See, *e. g.*, *Holmes* v. *J. Ray McDermott & Co.*, 682 F. 2d, at 1146; *McQurter* v. *Atlanta*, 724 F. 2d 881, 882 (CA11 1984) *(per curiam)*. This Court itself implicitly acknowledged the possibility of such an approach in *Boeing Co.* v. *Van Gemert*, 444 U. S. 472 (1980), where, in holding that a judgment on the merits was final and immediately appealable apart from the question of attorney's fees, we expressly distinguished cases in which the plaintiff had specifically requested attorney's fees as part of the prayer in his complaint. *Id.*, at 479–480, n. 5. Now that we are squarely confronted with the question, however, we conclude that the § 1291 effect of an unresolved issue of attorney's fees for the litigation at hand should not turn upon the characterization of those fees by the statute or decisional law that authorizes them.

We have said elsewhere that "[t]he considerations that determine finality are not abstractions but have reference to very real interests—not merely those of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system." *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 69 (1948). Indeed, in the context of the finality provision governing appealability of matters from state courts to this Court, 28 U. S. C. § 1257, we have been willing in effect to split the "merits," regarding a claim for an accounting to be sufficiently "dissociated" from a related claim for delivery of physical property that "[i]n effect, such a controversy is a multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled." *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 126 (1945). This practical approach to the matter suggests that what is of importance here is not preservation of conceptual consistency in the status of a particular fee authorization as "merits" or "nonmerits," but rather preservation of operational consistency and predictability in the overall application of § 1291. This requires, we think, a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final.

For all practical purposes an appeal of merits-without-attorney's-fees when there is a statute deeming the attorney's fees to be part of the merits is no more harmful to the trial process than an appeal of merits-without-attorney's-fees when there is no such statute. That "deeming" does not render the appeal more disruptive of ongoing proceedings, more likely to eliminate a trial judge's opportunity for reconsideration, more susceptible to being mooted by settlement, or in any way (except nominally) a more piecemeal enterprise. In short, no interest pertinent to § 1291 is served by according different treatment to attorney's fees deemed part of the merits recovery; and a significant interest is disserved. The time of appealability, having jurisdictional consequences, should above all be clear. We are not inclined to adopt a disposition that requires the merits or nonmerits status of each attorney's fee provision to be clearly established before the time to appeal can be clearly known. Courts and litigants are best served by the bright-line rule, which accords with traditional understanding, that a decision on the merits is a "final decision" for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case.

Finally, petitioner argues that even if the Court of Appeals properly decided the question of appealability, the decision constitutes a significant change in the law and therefore should only be applied prospectively. Regardless of whether today's decision works a change, our cases hold that "[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." *Firestone Tire & Rubber Co.* v. *Risjord,* 449 U. S. 368, 379–380 (1981). Since the Court of Appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely, and since the taking of an appeal within the prescribed time is mandatory and jurisdictional, see Fed. Rules App. Proc. 2, 3(a), 4(a)(1), 26(b); *United States* v. *Robinson,* 361 U. S. 220, 229 (1960); *Farley Transportation Co.* v. *Santa Fe Trail Transportation Co.,* 778 F. 2d 1365, 1368–1370 (CA9 1985), the Court of Appeals was without jurisdiction to review the decision on the merits.

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The Tenth Circuit correctly concluded that federal law governed the question of appealability and that petitioner's judgment on the merits was final and appealable when entered. Accordingly, its judgment is

Affirmed.

FEDERAL ENERGY REGULATORY COMMISSION *v.* MARTIN EXPLORATION MANAGEMENT CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 87–363. Argued March 28, 1988—Decided May 31, 1988*

To cover the situation of overlapping provisions of the Natural Gas Policy Act of 1978 fixing price ceilings for sales of various categories of natural gas and providing for phased deregulation, § 101(b)(5) of the Act states that if any natural gas qualifies under more than one provision providing for any maximum lawful price or for any exemption from such a price with respect to certain sales of gas, "the provision which could result in the highest price shall be applicable." The Federal Energy Regulatory Commission (FERC) promulgated a regulation interpreting § 101(b)(5) (and § 121, which relates to phased deregulation) to mean that any gas that is qualified for both deregulated and regulated treatment would be treated as deregulated. The regulation adversely affected gas producers who had entered into long-term contracts that had one clause setting the price (near the price ceiling) if the gas were regulated and another clause setting the price (on the basis of market price, or calling for renegotiation) if the gas were deregulated. Because the market price of natural gas had plunged below the regulated price ceilings, such producers stood to reap higher contractual prices if their gas was regulated than if it was deregulated. Numerous producers petitioned for review of FERC's regulation. The Court of Appeals rejected FERC's interpretation and adopted the producers' position that § 101(b)(5) unambiguously requires the applicable category to be that which, at any particular moment, garners the producer the highest contract price for its gas. In explaining this holding, the Court of Appeals also rejected FERC's ruling that certain "new tight formation gas" subject to regulation under § 107(c)(5) is automatically qualified for deregulation as new gas under §§ 102(c) or 103.

Held:

1. The Court of Appeals erred in rejecting FERC's interpretation of § 101(b)(5). The statute's plain meaning governs. It provides for the applicability of the overlapping provision that "could" result in the high-

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*Together with No. 87–364, *Public Service Commission of the State of New York et al.* v. *Martin Exploration Management Co. et al.*, also on certiorari to the same court.

est price, not that provision which "will" (depending on actual contracts and daily market prices) result in the highest price for each producer. Section 101(b)(5)'s words call for a simple comparison between the highest price permitted by one provision and the highest price permitted by another: the higher the price ceiling, the higher the price that "could" result under the provision. When one of the provisions sets no price ceiling at all—*i. e.*, it deregulates—that provision governs. The court erred in concluding that reading the word "could" with its ordinary conditional meaning makes so little sense that it must be converted to the word "will." The statute does not mean to refer to particular contracts but rather to the generic situation of parties in a precontract state: the provision that allows the parties to contract to the highest conceivable price applies. The statute calls for a comparison of statutory provisions, not contractual ones, and nothing in the statute or legislative history suggests that Congress wanted the classification of gas to turn on contractual terms. Moreover, the Court of Appeals' reading is contrary to the whole thrust of the Act, for it has the effect of turning a statutory scheme of price ceilings and deregulation into a system of price supports for producers. It also creates a chaotic scheme wherein the applicable provision for a particular type of gas varies depending on the producer, the contract, and the current market price. Pp. 209–211.

2. The Court of Appeals also erred in overturning FERC's ruling that certain gas qualified as "new tight formation gas" subject to regulation under § 107(c)(5) of the Act is automatically qualified as deregulated "new" gas under §§ 102(c) or 103. Section 107(c)(5) gives FERC authority to make eligible, for special high-cost gas pricing, natural gas "produced under such . . . conditions as [FERC] determines to present extraordinary risks or costs." There is nothing objectionable about FERC's ruling, which merely recognizes that certain "new tight formation gas"—which requires the producer to file the same information (in addition to other information) that would be filed to qualify under either § 102(c) or § 103—is a subset of deregulated "new" gas under the latter sections. The Court of Appeals' contrary conclusion was based on its reading of § 101(b)(5), rejected above, and its erroneous interpretation of certain portions of the legislative history. Nor does FERC's rule intrude on the jurisdiction of other state and federal agencies to make category determinations under § 503. FERC has made no category determinations, but has merely promulgated, pursuant to its ample authority, a definitional rule applicable in determination proceedings. Pp. 211–213.

813 F. 2d 1059, reversed.

BRENNAN, J., delivered the opinion of the Court, in which all other Members joined, except WHITE, J., who took no part in the consideration or decision of the cases.

Richard G. Taranto argued the cause for petitioner in No. 87-363. With him on the briefs were *Acting Solicitor General Ayer*, *Deputy Solicitor General Cohen*, *Catherine C. Cook*, *Jerome M. Feit*, *Joel M. Cockrell*, and *John H. Conway*. *Richard A. Solomon* argued the cause for petitioners in No. 87-364. With him on the briefs were *Mark N. Mutterperl*, *Terence J. Collins*, *Robert Ballentine*, *Raymond N. Shibley*, *Frederick Moring*, and *Herbert J. Martin*. *John E. Holtzinger, Jr.*, *Joseph E. Stubbs*, *Loren S. Meltzer*, *Stephen E. Williams*, *Georgia B. Carter*, *David E. Weatherwax*, and *Mark G. Magnuson* filed a brief for CNG Transmission Corp. as respondent under this Court's Rule 19.6, in support of petitioners.

Jeffrey S. Davidson argued the cause for respondents in both cases. With him on the brief were *Stephen A. Herman*, *Michael L. Pate*, *Charles H. Shoneman*, *John L. Williford*, *Charles L. Pain*, *Harris S. Wood*, *James B. Atkin*, *David J. Evans*, *C. Roger Hoffman*, *Douglas W. Rasch*, *R. Gordon Gooch*, *Ronald D. Hurst*, *Paul W. Hicks*, *John McDonald*, *Richard E. Powers, Jr.*, *Kenneth L. Riedman*, *Thomas G. Johnson*, and *Constance D. Coleman*.†

JUSTICE BRENNAN delivered the opinion of the Court.

These cases involve natural gas covered by overlapping provisions of the Natural Gas Policy Act of 1978—one setting a price ceiling, the other declaring prices deregulated. Petitioners contend that under § 101(b)(5) of the Act such gas should be classified as deregulated gas. The United States Court of Appeals for the Tenth Circuit held that under

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†Briefs of *amici curiae* urging reversal were filed for the Interstate Natural Gas Association of America by *John H. Cheatham III;* and for Williams Natural Gas Co. by *Dale A. Wright*, *James T. McManus*, *Michael E. Small*, *Bobby Potts*, and *John Cary*.

§101(b)(5) such gas falls under whichever classification affords producers the highest price under their contracts and current market conditions. The Court of Appeals also held invalid a Federal Energy Regulatory Commission (FERC) ruling that certain "new tight formation gas" under §107(c)(5) of the Act is automatically "new" gas qualified for deregulated treatment under §102(c) or §103 of the Act. We reverse on both issues.

I

From 1938 to 1978, the Federal Government regulated only the interstate natural gas market. By the 1970's, however, shortages in the interstate market developed because gas producers could get higher prices in unregulated intrastate markets. Two conflicting legislative solutions were developed: the Senate passed a bill deregulating interstate gas, S. 2104, 95th Cong., 1st Sess. (1977); the House passed a bill extending federal regulation to intrastate gas, H. R. 8444, 95th Cong., 1st Sess. (1977). The Conference Committee struck a compromise. H. R. Conf. Rep. No. 95–1752 (1978). The result was the Natural Gas Policy Act of 1978 (Act), Pub. L. 95–621, 92 Stat. 3351, 15 U. S. C. §3301 *et seq.*

The Act defines various categories of gas spanning both interstate and intrastate gas, and creates a two-part system of phased deregulation. First, the Act establishes price ceilings for wellhead first sales of gas that vary with the applicable category of gas and that gradually increase over time. §§101–110, 15 U. S. C. §§3311–3320. Second, the Act establishes a three-stage elimination of price ceilings for certain categories: the price ceilings for certain "high-cost" gas were eliminated in 1979, for certain "old" intrastate gas and "new" gas in 1985, and for certain other "new" gas in 1987. See §121, 15 U. S. C. §3331.

Many of these categories overlap. Recognizing the overlap, Congress provided in §101(b)(5) of the Act, 15 U. S. C. §3311(b):

> "If any natural gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable."

In anticipation of the 1985 deregulation, FERC promulgated a regulation interpreting §§121 and 101(b)(5) to mean that any gas that was qualified for both deregulated and regulated treatment would be treated as deregulated. 18 CFR §270.208 (1987).

This preference for deregulatory treatment adversely affected many gas producers who had entered into certain types of long-term contracts. Typically, these contracts had one clause setting the price if the gas were regulated and another clause setting the price if it were deregulated. The contract price for regulated gas was typically close to the price ceiling; the contract price for deregulated gas was typically based on market prices or left open to renegotiation. Because by 1984 the market price of natural gas had plunged below the regulated price ceilings, these producers stood to reap higher contractual prices if their gas was regulated than if it were deregulated.

Dissatisfied with FERC's regulation, numerous producers petitioned for review to the United States Court of Appeals for the Tenth Circuit. The Court of Appeals rejected FERC's interpretation of §§121 and 101(b)(5), adopting the producers' position that §101(b)(5) unambiguously requires the applicable category to be that which, at any particular moment, garners the producer the highest contract price for its gas. 813 F. 2d 1059 (1987). In explaining this holding, the Court of Appeals also rejected FERC's ruling that certain "new tight formation gas" subject to regulation under §107(c)(5), 15 U. S. C. §3317(c)(5), is automatically qualified for deregulation as new gas under §102(c) or §103, 15 U. S. C. §§3312, 3313. See 813 F. 2d, at 1069–1070. We granted certiorari. 484 U. S. 962 (1987).

II

"The plain meaning of the statute decides the issue presented." *Bethesda Hospital Assn.* v. *Bowen*, 485 U. S. 399, 403 (1988). The Act states that "the provision which *could* result in the highest price shall be applicable." § 101(b)(5) (emphasis added). It does not state that the applicable provision is that which *will* (depending on actual contracts and daily market prices) result in the highest price for each producer. We think these words call for a simple comparison between the highest price permitted by one provision and the highest price permitted by another: the higher the price ceiling, the higher the price that "could result" under the provision. The provision with the highest price ceiling thus applies uniformly to all producers selling gas that falls within both provisions. When one of the provisions sets no price ceiling at all—*i. e.*, it deregulates—that provision governs.

The Court of Appeals rejected this straightforward interpretation on the ground that, although the price of deregulated gas "could" in theory rise without limit, "the price of regulated gas 'could' be higher than the price of deregulated gas." 813 F. 2d, at 1068. The court reasoned that "[s]uch an understanding of 'could'—one that considers only the theoretical possibilities—renders § 101(b)(5) meaningless." *Ibid.* Rather, the court concluded: "'Could' makes sense in § 101(b)(5) only in the context of how gas sales actually occur." *Ibid.* Under this reading of § 101(b)(5), the statute requires a determination of which provision would actually result in a higher price under current market prices for that gas and the contractual arrangement each producer had for the sale of that gas. *Ibid.* The provision that actually results in the highest price at any particular moment establishes the applicable category for that producer's gas.

We disagree with the Court of Appeals' conclusion that reading the word "could" in § 101(b)(5) with its ordinary conditional meaning makes so little sense that the word "could" must be converted to the word "will." The conditional meaning of "could" makes perfect sense if the statute does not mean to refer to particular contracts but rather to the generic situation of parties in a precontract state: the provision that allows the parties to contract to the highest conceivable price applies. Congress must have had in mind the fact that prior to entering into a contract the parties could always contract to a higher price—*i. e.*, a higher price could result—without a price ceiling than with one. After all, no party has any reason to contract to a higher price simply because a price ceiling has been imposed; the price ceiling can only impose a direct legal restraint if the market price would be above the price ceiling. Cf. § 101(b)(9), 15 U. S. C. § 3311(b)(9) (declaring contract prices enforceable if they do not exceed an applicable price ceiling or if a deregulatory provision applies). The Court of Appeals' difficulty with the statutory language is caused by its focus on the postcontract situation, where many of the contracts contain clauses that have the perverse effect of increasing the price when a price ceiling is imposed. We doubt seriously that Congress enacted § 101(b)(5) with such contracts in mind or that it would have wished to make sure that the Act interacted with such contracts to mandate the maximum price possible. Certainly nothing in the legislative history suggests Congress had such a system in mind.

Indeed, the Court of Appeals' reading is contrary to the whole thrust of the Act, for it has the effect of turning a statutory scheme of price ceilings and deregulation into a system of price supports for producers. There is no evidence that Congress had any intent to create such a producer-assistance program. The Act was a compromise: those supporting deregulation were opposed only by those who thought deregulation would allow producers to charge excessive prices. Not one participant in the legislative process suggested that producers should receive higher prices than deregulation would afford them. The operating assumption of Congress was that deregulation was the most favorable regime for gas producers under consideration. See, *e. g.*, 124 Cong. Rec. 28633 (1978) (statement of Sen. Jackson) (describing deregulation as "the maximum economic incentive").

We are moreover reluctant to read § 101(b)(5) as making the applicable provision for a particular type of gas vary not only from producer to producer and from contract to contract, but from day to day as the actual market price of that gas changes. The statute is phrased in a general way that implies that all gas fitting the same overlapping provisions will be treated the same, and one would normally expect that a regulatory regime would apply uniformly rather than varying in such a chaotic fashion. The statute calls for a comparison of statutory provisions, not contractual ones, and nothing in the statute or legislative history suggests that Congress wanted the classification of gas to turn on contractual terms. Indeed, if the logic of the Court of Appeals' position were pursued, then, even for gas that fell into two regulated categories, § 101(b)(5) would require a comparison of each producer's contract prices for each category rather than a comparison of the ceiling prices for each category. We see no reason for inferring that Congress intended such a regulatory regime or the disuniformity and administrative difficulties it would entail.

III

We also disagree with the Court of Appeals' decision to overturn FERC's ruling that certain gas qualified as "new tight formation" gas under § 107(c)(5), 15 U. S. C. § 3317(c)(5), is automatically also qualified as deregulated "new" gas under § 102(c) or § 103, 15 U. S. C. §§ 3312(c), 3313. Section 107(c)(5) gives FERC authority to make eligible for special high-cost gas pricing natural gas "produced under such . . . conditions as [FERC] determines to present extraordinary risks or costs." Pursuant to § 107(c)(5), FERC has defined "new tight formation gas" as gas

> "(i) Which is new natural gas, (as defined in section 102(c)), certain OCS gas qualifying for the new natural gas ceiling price (as defined in section 102(d)), or gas produced through a new onshore production well (as defined in section 103(c); and
>
> "(ii) Which is produced from a designated tight formation through a well the surface drilling of which began on or after July 16, 1979." 18 CFR § 271.703(b)(2) (1987).

In the proceeding below, which did not address certain Outer Continental Shelf gas under §102(d), 15 U. S. C. §3312(d), FERC has simply ruled that, because "[i]n order to qualify as new tight-formation gas under section 107(c)(5), a producer must file the same information, in addition to other information, that would be filed to qualify as a section 102 or 103 determination . . . , a determination that gas qualifies as new tight-formation gas is implicitly a determination that the gas meets the qualifications for either section 102(c) or 103 . . . , regardless of whether that was explicit at the time that the determination was made." 49 Fed. Reg. 46874, 46880 (1984).

We see nothing objectionable about this ruling, which merely recognizes that, as defined, the types of "new tight formation gas" that were under consideration by FERC are a subset of deregulated "new" gas under § 102(c) or § 103. The Court of Appeals' objections to the ruling were based on its conclusion that allowing one qualification to result automatically in a second qualification would interfere with what it inferred was Congress' intent to give producers the right to select the categories they desired. 813 F. 2d, at 1069. The court had two bases for inferring this intent. One was its reading of § 101(b)(5), which we reject above. The other was its reading of certain portions of the legislative history, which state that governmental agencies have no affirmative obligation to identify the applicable classification and that it is up to producers to apply for the designations they want. 813 F. 2d, at 1070 (quoting 124 Cong. Rec. 29109, 38363–38364

(1978)). But the fact that Congress declined to impose affirmative investigative duties on agencies hardly means that it did not want FERC to adopt rules for classifying gas based on the evidence presented by producers at determination hearings.

The producer respondents also argue that FERC's rule intrudes on the jurisdiction other state and federal agencies have to make category determinations under § 503, 15 U. S. C. § 3413. FERC, however, has made no category determinations. It has merely promulgated a definitional rule applicable in determination proceedings. This FERC has ample authority to do. Not only does § 107(c)(5) give FERC broad authority to define the gas eligible for § 107(c)(5) treatment, but § 503 gives FERC authority to review the category determinations of other agencies and to prescribe the manner and substantiation with which such category determinations must be presented for its review. And under § 501, 15 U. S. C. § 3411, FERC has general authority to define terms under the Act and to prescribe "such rules and orders as it may find necessary or appropriate to carry out its functions."

For the foregoing reasons, the judgment of the Court of Appeals is

Reversed.

JUSTICE WHITE took no part in the consideration or decision of these cases.

AMADEO *v.* ZANT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 87–5277. Argued March 28, 1988—Decided May 31, 1988

Petitioner was convicted of murder and criminal attempt to commit theft in the Superior Court of Putnam County, Georgia. In accordance with the jury's recommendation of death, the court imposed the death penalty for the murder charge, and a 10-year sentence for the attempted theft charge. While petitioner's direct appeal was pending, an independent civil action involving a challenge to voting procedures in Putnam County was brought in Federal District Court, which found that a memorandum from the District Attorney's Office to the Putnam County Jury Commissioners was intentionally designed to result in underrepresentation of black people and women in the master jury lists from which all grand and traverse (petit) juries were drawn. *Bailey* v. *Vining*, Civ. Action No. 76–199 MAC (MD Ga., Aug. 17, 1978). One of the plaintiffs' attorneys had uncovered the memorandum while researching the case. The District Court in *Bailey* concluded that the master lists could not be used for any purpose until the unconstitutional discrimination had been corrected, and ordered the Jury Commissioners to reconstitute the lists in conformity with the Constitution. Citing *Bailey*, petitioner's attorneys, on his direct appeal, raised a challenge to the composition of the Putnam County juries that had indicted, convicted, and sentenced petitioner. Affirming petitioner's convictions and sentences, the Georgia Supreme Court rejected his challenge to the jury on the ground that it came too late. After exhausting his state remedies, petitioner sought a writ of habeas corpus in Federal District Court on the basis of the jury composition issue, before the same judge who had decided the *Bailey* case. Granting the writ and noting the *Bailey* decision, the court concluded that petitioner had established sufficient cause for his failure to raise in the trial court the jury challenge and sufficient prejudice to excuse the procedural default. The Court of Appeals found the record insufficiently developed for proper review of the question of cause, and remanded for an evidentiary hearing. On remand, the District Court held a hearing at which it received testimony from petitioner's trial lawyers, a lawyer who assisted petitioner's lawyers in developing the jury challenge on direct appeal, and the lawyer who discovered the memorandum in the *Bailey* case. The judge then reaffirmed his earlier conclusion that petitioner had demonstrated adequate cause to excuse his procedural default. The Court of Appeals reversed, stating that it "disagreed" with the District Court's conclusion that the racial disparity on the jury lists was concealed by county officials. The Court of Appeals found instead that the memorandum was readily discoverable in the public records, and that the lawyers had made a considered tactical decision not to mount a jury challenge. In light of its findings, the court concluded that petitioner had not established cause for his failure to raise the constitutional challenge in accordance with Georgia procedural law.

Held: The factual findings upon which the District Court based its conclusion that petitioner had established cause for his procedural default were not clearly erroneous and should not have been set aside by the Court of Appeals. Pp. 221–229.

(a) Although a "tactical" or "intentional" decision to forgo a procedural opportunity in state court normally cannot constitute cause, the failure of counsel to raise a constitutional issue reasonably unknown to him is a situation in which the cause requirement is met. A showing that the factual or legal basis for a claim was not reasonably available to counsel or that some interference by officials made compliance impracticable, constitutes cause. The facts found by the District Court here permitted the court's legal conclusion that petitioner had established cause for his procedural default. If the District Attorney's memorandum was not reasonably discoverable because it was concealed by county officials, and if that concealment, rather than tactical considerations, was the reason for the failure of petitioner's lawyers to raise the jury challenge in the trial court, then petitioner established ample cause to excuse his procedural default. The Court of Appeals offered factual rather than legal grounds for its reversal of the District Court's order, concluding that neither of the two factual predicates for the District Court's legal conclusion was supported by the record. However, a federal appellate court may set aside a trial court's factfindings only if they are "clearly erroneous," and must give due regard to the trial court's opportunity to judge the credibility of the witnesses. The record viewed in its entirety establishes that the Court of Appeals failed properly to apply the "clearly erroneous" standard. Pp. 221–223.

(b) The District Court's factual finding that the District Attorney's memorandum was concealed by county officials and therefore was not reasonably available to petitioner's lawyers was not clearly erroneous. Based on the record, the District Court permissibly could have concluded that the memorandum was discovered by mere fortuity and that it would not have been "readily discoverable" had petitioner's trial attorneys investigated the jury lists that were relevant to his trial. The Court of Appeals identified no evidence in the record—aside from the fact that the memorandum eventually was discovered—that contradicted the District Court's conclusions about the concealment and availability of the memorandum. Pp. 223–224.

(c) The District Court's conclusion that petitioner's lawyers did not deliberately bypass the jury challenge also was not clearly erroneous. Although there is significant evidence in the record to support the findings of fact favored by the Court of Appeals, there is also significant evidence to support the District Court's contrary conclusion. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. Here, the District Court reasonably could have concluded that the trial lawyers' statements that they considered but ultimately rejected a jury challenge simply were not credible. This conclusion was also supported by the directly contradictory testimony of two other witnesses at the habeas corpus hearing and by events contemporaneous with the jury selection process. The District Court's lack of precision about the bases for its factual conclusions furnishes no excuse to ignore the dictates of the clearly-erroneous standard and to engage in impermissible appellate factfinding. Pp. 224–229.

816 F. 2d 1502, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

Stephen B. Bright argued the cause for petitioner. With him on the brief were *Palmer Singleton*, *Robert L. McGlasson*, and *William M. Warner*.

Susan V. Boleyn, Senior Assistant Attorney General of Georgia, argued the cause for respondent. With her on the brief were *Michael J. Bowers*, Attorney General, *Marion O. Gordon*, First Assistant Attorney General, and *William B. Hill, Jr.*, Senior Assistant Attorney General.*

JUSTICE MARSHALL delivered the opinion of the Court.

In considering petitioner's motion for a writ of habeas corpus, the District Court concluded that petitioner successfully established cause for his failure to raise in the state trial court a constitutional challenge to the composition of the juries that indicted him, convicted him, and sentenced him to death. This case presents the question whether the factual findings upon which the District Court based its conclusion were clearly erroneous.

**Julius L. Chambers* and *Charles Stephen Ralston* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* urging reversal.

I

Petitioner Tony B. Amadeo was convicted of murder and criminal attempt to commit theft in November 1977 in the Superior Court of Putnam County, Georgia. The jury returned a recommendation of death for the murder charge, and the court imposed the death sentence. In addition, the court imposed a 10-year sentence for the attempted theft charge.

Nine months later, while petitioner was pursuing his direct appeal to the Georgia Supreme Court, an independent civil action in federal court brought to light a scheme by the District Attorney and the Jury Commissioners of Putnam County to underrepresent black people and women on the master jury lists from which all grand and traverse (petit) juries were drawn. See *Bailey* v. *Vining*, Civ. Action No. 76–199 MAC (MD Ga., Aug. 17, 1978). *Bailey* involved a challenge to the at-large voting procedures in Putnam County. In the course of researching the case, one of the plaintiffs' attorneys reviewed the master jury lists for a period of 20 to 30 years and uncovered a handwritten memorandum on a sheet of legal paper. The missive bore no caption or other designation, no signature, no date, and no file stamp from the court Clerk's office. Under the heading "Result," the sheet listed figures for the number of black people and women to be placed on the master jury lists that would result in their underrepresentation on grand and traverse juries by a range of 5 to 11%. App. 4. The attorney who discovered the memorandum asked the Clerk of the court where it came from, and the Clerk responded that it was instructions from the District Attorney's Office to the Jury Commissioners about the master jury lists. *Id.*, at 45. According to the

Clerk, the Jury Commissioners followed the memorandum's instructions.[1] *Id.*, at 9.

The District Court in *Bailey* found that the memorandum was intentionally designed to underrepresent black people and women on grand and traverse juries without giving rise to a prima facie case of racial discrimination under this Court's opinion in *Swain* v. *Alabama*, 380 U. S. 202, 208–209 (1965) (underrepresentation of less than 10% is insufficient to prove intentional discrimination), and the Fifth Circuit's opinion in *Preston* v. *Mandeville*, 428 F. 2d 1392, 1393–1394 (1970) (13.3% underrepresentation constitutes prima facie case). See App. 10, 78. Concluding that the master jury lists could not be used for any purpose until the discrimination had been corrected, the District Court ordered the Jury Commissioners to reconstitute the lists in conformity with the Constitution. *Bailey* v. *Vining*, *supra*, at 7.

Citing the District Court's order in *Bailey*, petitioner's attorneys raised a challenge to the composition of the Putnam County juries that had indicted, convicted, and sentenced petitioner in their opening brief on direct appeal to the Georgia Supreme Court. In addition, petitioner's attorneys filed a supplemental brief devoted solely to the jury composition issue, in which they argued that the challenge had not been waived in Superior Court because they had not had any opportunity to discover the purposeful discrimination. See App. 14–18. The Georgia Supreme Court nevertheless affirmed petitioner's convictions and sentences, rejecting his challenge to the jury on the ground that it "comes too late."[2]

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[1] The Jury Commissioners were able to determine the race of prospective jurors because the master jury lists were drawn from the list of registered voters in Putnam County, which was maintained on a racially segregated basis. See *Bailey* v. *Vining*, Civ. Action No. 76–199 MAC (MD Ga., Aug. 17, 1978), p. 9.

[2] Georgia law requires that a known challenge to the composition of the grand jury be raised before indictment, see *Sanders* v. *State*, 235 Ga. 425, 425–426, 219 S. E. 2d 768, 771 (1975), and that a challenge to the compo-

Amadeo v. *State*, 243 Ga. 627, 629, 255 S. E. 2d 718, 720, cert. denied, 444 U. S. 974 (1979). Petitioner twice sought a writ of habeas corpus in the state courts without success, and this Court denied certiorari both times.

After exhausting his state remedies, petitioner sought a writ of habeas corpus in Federal District Court. Petitioner's habeas petition was heard by the same District Judge who had decided the *Bailey* case. The court noted that *Bailey* established that the Putnam County Jury Commissioners had composed the master jury lists so as deliberately to underrepresent black citizens without giving rise to a prima facie case of intentional discrimination. App. 78. Accordingly, the court concluded that "[c]learly, petitioner was indicted, tried and sentenced by unconstitutionally composed juries." *Ibid.* The court went on to explain that in light of the Georgia Supreme Court's finding of waiver under state law, petitioner could assert his constitutional claim in the federal habeas proceeding only if he established cause and prejudice within the meaning of this Court's decision in *Francis* v. *Henderson*, 425 U. S. 536, 542 (1976). Observing that petitioner's lawyers had raised the discrimination claim as soon as the inculpatory evidence came to light, the court found that they had engaged in no "'sandbagging'" or "deliberate bypass"—the principal concerns behind the cause and prejudice requirement. Concluding that to overlook the intentional discrimination in this case would result in a "miscarriage of justice," the District Court found sufficient cause and prejudice to excuse the procedural default and granted the writ on the basis of petitioner's constitutional challenge. App. 80.

The Court of Appeals for the Eleventh Circuit remanded the case for an evidentiary hearing. *Amadeo* v. *Kemp*, 773 F. 2d 1141 (1985). Acknowledging that neither party had requested a hearing before the District Court, the Court of

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sition of the traverse jury be raised before *voir dire* commences, see *Spencer* v. *Kemp*, 781 F. 2d 1458, 1463–1464 (CA11 1986) (en banc).

Appeals nonetheless found the record insufficiently developed for proper review of the question of cause.[3] *Id.*, at 1145. The Court of Appeals requested that the District Court establish on remand "[t]he specifics of the alleged unconstitutional method of selecting the jurors and whether this method was so devious and hidden as to be nondiscoverable." *Ibid.*

On remand, the District Court held an evidentiary hearing at which it received testimony from petitioner's two trial lawyers, a lawyer who assisted petitioner's lawyers in developing the jury challenge on direct appeal, and the lawyer who discovered the memorandum in the *Bailey* case. At the conclusion of the hearing, the judge issued an oral order and memorandum opinion in which he reaffirmed his earlier conclusion that petitioner had demonstrated adequate cause to excuse his procedural default. App. 90–93. The court observed that the District Attorney had made no attempt to deal honestly with petitioner's lawyers and reveal that he had guided the Jury Commissioners' manipulation of the jury lists. *Id.*, at 92. The court concluded that, in light of all the circumstances of the case, "it was reasonable for [petitioner's lawyers] at the time that they were appointed, to not challenge the list," *ibid.*, adding, "I don't think it was a deliberate by-pass in any sense." *Id.*, at 93. The court specifically found that if petitioner's lawyers had known of the District Attorney's memorandum, they would have challenged the composition of the jury. *Id.*, at 92.

A divided panel of the Eleventh Circuit reversed. *Amadeo* v. *Kemp*, 816 F. 2d 1502 (1987). The court noted that the District Court had found that the racial disparity on the jury lists was concealed by county officials, *id.*, at 1507, but the court stated simply that it "disagree[d] with that conclusion." *Ibid.* The court found instead that "[t]he memorandum detailing the county's efforts to alter the racial composition of the master jury lists . . . was readily discoverable in the county's public records" and that petitioner's lawyers "would have found the memorandum" had they examined the records. *Ibid.* The court further found that petitioner's lawyers had "made a considered tactical decision not to mount a jury challenge because they wanted to preserve an advantageous jury venire," *ibid.*, although the court acknowledged that there had been conflicting testimony at the evidentiary hearing on this point. *Id.*, at 1507, n. 9. In light of these findings, the court concluded that petitioner had not established cause for his failure to raise his constitutional challenge in accordance with Georgia procedural law.

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[3] Noting that the State apparently had conceded that the Putnam County jury selection procedures were unconstitutional, the Court of Appeals found the prejudice requirement to be satisfied. 773 F. 2d, at 1145, n. 6.

The dissenting judge argued as a threshold matter that the majority ignored its obligation to defer to the trial court's factual findings unless they are clearly erroneous. *Id.*, at 1508, 1510, 1511. More broadly, the dissent maintained that "[w]here the state's efforts to conceal its misconduct cause an issue to be ignored at trial, the state should not be allowed to rely on its procedural default rules to preclude federal habeas review." *Id.*, at 1513.

We granted certiorari, 484 U. S. 912 (1987), and we now reverse.

II

In *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), this Court adopted the "cause and prejudice" requirement of *Francis* v. *Henderson*, *supra*, for all petitioners seeking federal habeas relief on constitutional claims defaulted in state court. The *Sykes* Court did not elaborate upon this requirement, but rather left open "for resolution in future decisions the precise definition of the 'cause'-and-'prejudice' standard." 433 U. S., at 87. Although more recent decisions likewise have not attempted to establish conclusively the contours of the standard, they offer some helpful guidance on the question of cause. In *Reed* v. *Ross*, 468 U. S. 1 (1984), the Court explained that although a "tactical" or "intentional" decision to forgo a procedural opportunity normally cannot constitute cause, *id.*, at 13–14, "the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the [cause] requirement is met." *Id.*, at 14. The Court later elaborated upon *Ross* and stated that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986). We explained that "a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable, would constitute cause under this standard." *Ibid.* (citations omitted).

The Court of Appeals did not contest, nor could it, that the facts found by the District Court in this case permitted the District Court's legal conclusion that petitioner had established cause for his procedural default. If the District Attorney's memorandum was not reasonably discoverable because it was concealed by Putnam County officials, and if that concealment, rather than tactical considerations, was the reason for the failure of petitioner's lawyers to raise the jury challenge in the trial court, then petitioner established ample cause to excuse his procedural default under this Court's precedents. The situation described by the District Court fits squarely, indeed almost verbatim, within our holdings in *Ross* and *Carrier*. First, the District Court essentially found that the basis for petitioner's claim was "reasonably unknown" to petitioner's lawyers, *Reed* v. *Ross*, *supra*, at 14, because of the "objective factor" of "'some interference by officials.'" *Murray* v. *Carrier*, *supra*, at 488 (citation omitted). Second, the District Court's finding of no deliberate bypass amounted to a conclusion that petitioner's lawyers did not make a "tactical" or "intentional" decision to forgo the jury challenge. *Reed* v. *Ross*, *supra*, at 13–14.

Hence, the Court of Appeals offered factual rather than legal grounds for its reversal of the District Court's order, concluding that neither of the two factual predicates for the District Court's legal conclusion was adequately supported by the record. The Court of Appeals never identified the standard of review that it applied to the District Court's factual findings. It is well settled, however, that a federal appellate court may set aside a trial court's findings of fact only if they are "clearly erroneous," and that it must give "due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses." Fed. Rule Civ. Proc. 52(a); see *Anderson* v. *Bessemer City*, 470 U. S. 564, 573–576 (1985) (describing clearly-erroneous review generally); *Wade* v. *Mayo*, 334 U. S. 672, 683–684 (1948) (applying clearly-erroneous review in federal habeas proceeding). We have stressed that the clearly-erroneous standard of review is a deferential one, explaining that "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson* v. *Bessemer City, supra,* at 573–574. After considering the "record viewed in its entirety" in the instant case, we conclude that the Court of Appeals failed properly to apply this standard.

A

The first factual finding rejected by the Court of Appeals is the District Court's conclusion that the District Attorney's memorandum was concealed by county officials and therefore was not reasonably available to petitioner's lawyers. The Court of Appeals acknowledged that the District Court had found these facts. See 816 F. 2d, at 1507. But without examining the record or discussing its obligations under Rule 52(a), the court simply expressed disagreement and substituted its own factual findings for those of the District Court. See *ibid.* (finding that the memorandum was "not concealed," but rather "was readily discoverable in the county's public records").

Even assuming, somewhat generously, that the Court of Appeals recognized and applied the appropriate standard of review, we cannot agree that the District Court's factual findings were clearly erroneous. The District Court's finding of concealment is supported by the nature of the memorandum itself, which was part of the documentary record before the court. See App. 44. The District Attorney's memorandum was handwritten, unsigned, unstamped, and undesignated—physical characteristics that strongly belie the notion that the document was intended for public consumption. Moreover, the attorney who originally discovered the memorandum testified that he did so as part of a sweeping investigation of 20 to 30 years' worth of jury lists. *Id.*, at 42. He further testified that the memorandum was "not on the first page of the materials that I was perusing but somewhere within the stack of materials that [the court Clerk] gave me." *Id.*, at 44. This testimony was not disputed, and the District Court permissibly could have concluded that the memorandum was discovered by mere fortuity and that it would not have been "readily discoverable" had petitioner's attorneys investigated the jury lists that were relevant to petitioner's trial. Indeed, the Court of Appeals identified no evidence in the record—aside from the fact that the memorandum eventually was discovered—that contradicted the District Court's conclusions about the concealment and availability of the memorandum. The Court of Appeals therefore should not have set aside as clearly erroneous the District Court's findings on these matters.

B

The second factual finding rejected by the Court of Appeals is the District Court's conclusion that petitioner's lawyers did not deliberately bypass the jury challenge. Here the Court of Appeals drew more heavily upon the record below, citing testimony from the evidentiary hearing in the District Court to the effect that petitioner's lawyers considered a jury challenge, thought they could win it, but decided not to bring the challenge because they were pleased with the jury ultimately empaneled. See 816 F. 2d, at 1506. The Court of Appeals emphasized that petitioner is a white man with a history of assaulting black people and that petitioner's lawyers therefore were not eager to have more black people on the jury. *Ibid.* The court also cited testimony from the lawyers that they were satisfied with the jury venire because it contained several members of a charismatic religious group that had seemed sympathetic to petitioner. *Ibid.* Most damaging to petitioner's case on habeas was the court's reliance on the statement of one of his lawyers that "'we made a tactical decision, a knowing, tactical decision not to challenge the array.'" *Ibid.*, quoting 2 Record 13, App. 23.

In the face of this potent testimony from petitioner's trial lawyers, petitioner argues that even if the lawyers did consider and deliberately bypass a jury challenge, the challenge that they bypassed was not the same challenge that is now being pressed, because the only argument available at the time of trial was a statistical challenge rather than a challenge based on direct evidence of intentional discrimination. The dissenting Circuit Judge also advanced this argument. 816 F. 2d, at 1510–1511 (Clark, J., dissenting). In the alternative, petitioner argues that the District Court's finding of no deliberate bypass was supported by other testimony and evidence in the record and thus should not have been set aside by the Court of Appeals.

It is not necessary to address the merits of petitioner's first argument, because we agree that the District Court's conclusion that petitioner's lawyers did not deliberately bypass the jury challenge was not clearly erroneous. Although there is significant evidence in the record to support the findings of fact favored by the Court of Appeals, there is also significant evidence in the record to support the District Court's contrary conclusion, as we describe in more detail below. We frequently have emphasized that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson* v. *Bessemer City,* 470 U. S., at 574, citing *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 342 (1949), and *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.,* 456 U. S. 844 (1982). We reaffirm that stricture today.

First, the District Court reasonably could have concluded that the lawyers' statements that they considered but ultimately rejected a jury challenge simply were not credible. Petitioner's trial lawyers, who were no longer representing him when they testified at the evidentiary hearing, had significant incentive to insist that they had considered every possible angle: they had lost a capital murder trial, and another lawyer had uncovered evidence of serious constitutional error in the proceedings. Moreover, the lawyers' statements that they thought they could win a jury challenge if they brought it are open to serious doubt. For one thing, the lawyers were quite wrong that they could have won a jury challenge; the underrepresentation of blacks and women on the master jury lists was engineered precisely to avoid a successful statistical challenge. Absent the "smoking gun" of the memorandum or some other direct evidence of discrimination, a statistical challenge would have certainly failed. In addition, the lawyers, when pressed, could offer no explanation for why they thought they could win such a jury challenge.[4] Thus, it was reasonable for the District

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[4] See App. 28:

"THE COURT: But I mean what led you to believe you would win if you challenged [the jury] . . . ?

"WITNESS PRIOR: I can't answer that; I think we just had a general knowledge that it probably wasn't statistically right and I don't know—I don't think we had any investigation to back that up."

See also *id.,* at 39 (witness Lambert offering no specific answer to the same question).

Court to reject the lawyers' testimony and conclude that "ignorance" of the strength of the jury challenge—rather than strategy—was the true reason for the lawyers' failure to raise the claim at trial. App. 93.

Second, the District Court's refusal to credit the testimony of petitioner's lawyers was supported by the directly contradictory testimony of two other witnesses. Christopher Coates, the lawyer who discovered the memorandum in the *Bailey* case, testified that when he told E. R. Lambert, one of petitioner's lawyers, about the memorandum and the result in the *Bailey* case, Lambert said: "'Well, we did not know that . . . I wish that we had known it because we were looking for every issue to raise because it was a serious case.'" App. 47. In addition, C. Nelson Jarnagin, a lawyer who assisted Lambert on appeal, testified that Lambert told him: "'If I'd known about this jury issue prior to trial, I would've raised it.'" *Id.*, at 59–60. It was within the District Court's discretion as factfinder to credit these statements over the potentially self-interested testimony of petitioner's lawyers.[5] See *Anderson* v. *Bessemer City*, *supra*, at 575 (stressing the special deference accorded determinations regarding the credibility of witnesses). Indeed, the Court of Appeals even noted the conflict in the testimony before the District Court, see 816 F. 2d, at 1507, n. 9, and its failure to defer to the District Court's findings in light of this recognition is difficult to fathom.

Finally, the District Court's conclusion that petitioner's lawyers did not deliberately bypass the jury challenge was supported by events contemporaneous with the jury selection process. Petitioner's lawyers filed pretrial motions for a change of venue and for a continuance to the next term of Superior Court, both of which, if granted, would have resulted in an entirely different jury venire. See App. 61–65. Both motions cited juror prejudice and claimed that a fair trial was not possible in Putnam County at that time. The District Court permissibly could have concluded that these motions and sworn statements undercut the lawyers' statements that they were completely satisfied with the jury venire they had drawn. Indeed, the District Court might well have considered this evidence more persuasive than the after-the-fact assessments of petitioner's lawyers or the other witnesses.

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[5] To be sure, the testimony of these two witnesses was hearsay, and Jarnagin's statement was prompted by a leading question on redirect examination. Nonetheless, no objection to either statement was made at the hearing, and the State does not argue that the District Court's admission of the statements was "plain error" under Federal Rule of Evidence 103(d).

To be sure, the District Court could have been more precise about the bases for its factual conclusions. Indeed, had the District Court identified the record evidence that supported its findings or made clear that it was relying upon credibility determinations, the Court of Appeals might have deferred to its factual findings without dispute. The District Court's lack of precision, however, is no excuse for the Court of Appeals to ignore the dictates of Rule 52(a) and engage in impermissible appellate factfinding. See *Icicle Seafoods, Inc.* v. *Worthington*, 475 U. S. 709, 712–715 (1986). Because there is sufficient evidence in the record considered in its entirety to support the District Court's factual findings, the Court of Appeals should not have set them aside. Respondent does not dispute that those factual findings are sufficient as a matter of law to support a finding of cause.[6] The Court of Appeals thus erred in holding petitioner's jury challenge to be procedurally barred from federal habeas review. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

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[6] Respondent seems to argue, however, that even if cause is found to be established, petitioner suffered no cognizable prejudice. See Tr. of Oral Arg. 57–58. This argument is irreconcilable with respondent's predecessor's failure to dispute in either the District Court or the Court of Appeals that the finding in *Bailey* of intentional racial discrimination in the composition of the master jury lists satisfies the requirement of prejudice. See 2 Record 67; *Amadeo* v. *Kemp*, 773 F. 2d, at 1145, n. 6. Having conceded this point in both courts below, respondent will not be heard to dispute it here. See *Washington* v. *Yakima Indian Nation*, 439 U. S. 463, 476, n. 20 (1979) (alternative ground for affirmance must be properly raised below).

It is so ordered.

FEDERAL DEPOSIT INSURANCE CORPORATION *v.* MALLEN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

No. 87–82. Argued March 22, 1988—Decided May 31, 1988

Title 12 U. S. C. § 1818(g)(1) authorizes the Federal Deposit Insurance Corporation (FDIC) to suspend from office an indicted official of a federally insured bank if his continued service poses a threat to the interests of the bank's depositors or threatens to impair public confidence in the bank. Section 1818(g)(3) entitles a suspended official to a hearing before the FDIC within 30 days of his written request, and to a final decision within 60 days of the hearing. At the hearing, the official may "submit written materials (or, at the discretion of the agency, oral testimony) and oral argument." The FDIC suspended appellee, the president and a director of a federally insured bank, after he was indicted for making false statements to the FDIC and the bank for the purpose of influencing the FDIC in violation of 18 U. S. C. §§ 1001 and 1014. A hearing was scheduled to occur 19 days after his written request for an expedited hearing, but the FDIC's regional counsel took the position that the oral testimony appellee proposed to offer at the hearing would not be necessary. Before the hearing date, appellee filed suit in the Federal District Court, which preliminarily enjoined the FDIC from enforcing the suspension order. Although it rejected appellee's argument that the order was invalid because it was not preceded by a hearing, the court concluded that § 1818(g)(3)'s post-suspension procedure violates the Due Process Clause of the Fifth Amendment because it does not guarantee a suspended officer a sufficiently prompt decision or an unqualified right to present oral testimony.

Held:

1. Section 1818(g)(3)'s post-suspension procedure is not unconstitutional on its face. Pp. 240–248.

(a) Appellee was not entitled to a pre-suspension hearing, since the important governmental interest in protecting depositors and maintaining public confidence, coupled with the fact that the felony indictment provided substantial assurance that the suspension was not baseless, justified prompt action before a suspension hearing was held. Cf. *Barry* v. *Barchi*, 443 U. S. 55. Pp. 240–241.

(b) Appellee was not denied a sufficiently prompt post-suspension hearing. Although a bank officer has an important, constitutionally protected interest in continued employment, he also has an interest in seeing that a decision concerning his continued suspension is not made with excessive haste. Moreover, a temporary suspension is not likely to augment the injury to the officer's reputation that has already been done by an indictment accusing him of serious wrongdoing. Thus, even a delay of the full 90 days allowed by § 1818(g)(3) for a post-suspension decision will usually be justified by the public interest in a correct decision as to whether depositors' interests or public confidence are threatened, and by the likelihood, arising from the grand jury's finding of probable cause that the officer has committed a felony involving dishonesty, that the suspension decision was not mistaken. The fact that the criminal proceedings might be concluded more promptly than the FDIC proceeding is irrelevant to the due process determination, since an acquittal will require that the suspension order be vacated, while a conviction will merely strengthen the case for maintaining the suspension. *Barry* v. *Barchi*, *supra*, distinguished. Pp. 241–247.

(c) The District Court's reliance on § 1818(g)(3)'s failure to guarantee an opportunity to present oral testimony was misplaced. The relevant regulation delegates the discretionary decision whether to accept oral testimony to the hearing officer, but appellee never gave that officer the opportunity to render a decision. There is no inexorable requirement that oral testimony be heard in every administrative proceeding in which it is tendered, and unconstitutionality cannot be premised on the fact that discretionary authority to admit or reject such evidence may be applied in an arbitrary or unfair way in some hypothetical case. Pp. 247–248.

2. There was no unfairness in the FDIC's use of the § 1818(g)(3) procedure in this case. P. 248.

667 F. Supp. 652, reversed.

STEVENS, J., delivered the opinion for a unanimous Court.

John Harrison argued the cause for appellant. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Cohen, Anthony J. Steinmeyer, Michael Kimmel, Ronald R. Glancz,* and *James A. Clark.*

Mary E. Curtin, by appointment of the Court, 484 U. S. 1055, argued the cause for appellee. With her on the brief was *David J. Siegrist.*

JUSTICE STEVENS delivered the opinion of the Court.

The question presented by this appeal concerns the constitutionality of a statutory provision that authorizes the

Federal Deposit Insurance Corporation (FDIC) to suspend from office an indicted official of a federally insured bank. The District Court concluded that the statutory post-suspension procedure is unconstitutional because it does not guarantee the suspended officer a sufficiently prompt decision or an unqualified right to present oral testimony. The District Court therefore enjoined the FDIC from enforcing an order suspending appellee from serving as the president and as a director of the Farmers State Bank in Kanawha, Iowa, and from otherwise participating in the conduct of the affairs of any FDIC-insured bank. 667 F. Supp. 652, 662, 664 (1987). We noted probable jurisdiction. 484 U. S. 911 (1987). We reverse.

I

In 1966 Congress adopted several amendments to the Federal Deposit Insurance Act to give federal banking agencies more effective regulatory powers to deal with crises in financial institutions.[1] The amendments were designed to protect the interests of depositors and to prevent the potentially debilitating effect of public loss of confidence in the banking industry. See S. Rep. No. 1482, 89th Cong., 2d Sess., 4–5 (1966) (S. Rep.); 112 Cong. Rec. 20080 (1966) (remarks of Sen. Proxmire). Congress therefore enacted 12 U. S. C. § 1818(g)(1) to give the appropriate federal banking agency[2] the authority to take immediate action to suspend an officer or director of an insured bank if he or she is formally charged with a felony involving dishonesty or breach of trust. As originally enacted, § 1818(g)(1) permitted the appropriate banking agency to suspend an indicted bank officer without providing an opportunity to be heard either before or after issuance of the order of suspension.[3]

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[1] See Financial Institutions Supervisory Act of 1966, Pub. L. 89–695, Title II, 80 Stat. 1046–1055, 12 U. S. C. § 1818.

[2] The statute defines "appropriate Federal banking agency" by reference to the type of bank subject to regulation. See 12 U. S. C. § 1813(q). For example, "in the case of a national banking association, a District bank, or a Federal branch or agency of a foreign bank," the Comptroller of the Currency is the "appropriate Federal banking agency." § 1813(q)(1). Section 1813(q)(3) provides that "in the case of a State nonmember insured Bank . . . or a foreign bank having an insured branch," the FDIC is the "appropriate Federal banking agency." It is undisputed that in this case the FDIC is the appropriate federal banking agency.

In 1974, the FDIC invoked its § 1818(g)(1) authority to suspend the president of an Illinois bank who had been indicted for conspiracy to commit mail fraud. That officer successfully challenged the constitutionality of the suspension on the ground that it had deprived him of property without due process of law. The three-judge District Court, in *Feinberg* v. *FDIC*, 420 F. Supp. 109 (DC 1976), found that the public interest in prompt action justified a suspension without a prior hearing, but concluded that the officer was constitutionally entitled to a prompt and meaningful post-suspension hearing in which he could attempt to persuade the FDIC to exercise its discretion to revoke the suspension. In its opinion, the District Court emphasized that the 1966 statute had given the FDIC standardless discretion to suspend or not to suspend an indicted bank official.[4]

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[3] As enacted in 1966, 12 U. S. C. § 1818(g)(1) provided:

"Whenever any director or officer of an insured bank, or other person participating in the conduct of the affairs of such bank, is charged in any information, indictment, or complaint authorized by a United States attorney, with the commission of or participation in a felony involving dishonesty or breach of trust, the appropriate Federal banking agency may, by written notice served upon such director, officer, or other person suspend him from office and/or prohibit him from further participation in any manner in the conduct of the affairs of the bank. A copy of such notice shall also be served upon the bank. Such suspension and/or prohibition shall remain in effect until such information, indictment, or complaint is finally disposed of or until terminated by the agency. In the event that a judgment of conviction with respect to such offense is entered against such director, officer, or other person, and at such time as such judgment is not subject to further appellate review, the agency may issue and serve upon such director, officer, or other person an order removing him from office and/or prohibiting him from further participation in any manner in the conduct of the affairs of the bank except with the consent of the appropriate agency. A copy of such order shall also be served upon such bank, whereupon such director or officer shall cease to be a director or officer of such bank. A finding of not guilty or other disposition of the charge shall not preclude the agency from thereafter instituting proceedings to remove such director, officer, or other person from office and/or to prohibit further participation in bank affairs, pursuant to paragraph (1), (2), (3), (4), or (7) of subsection (e) of this section." 80 Stat. 1050.

In response to the *Feinberg* decision, in 1978 Congress amended § 1818(g) by incorporating standards in subsection (1) to guide the FDIC in the exercise of its discretion,[5] and

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[4] The court noted the breadth of discretion afforded the agency and intimated that if suspension was mandatory upon indictment, no pre- or post-suspension hearing would be required:

"It appears arguable that if the issuance of a Notice and Order of Suspension were automatic upon the return of an indictment or the filing of an information or complaint, then there might not be a need for a hearing or other incidents of due process. Such an argument could only retain its vitality though if there were no agency determination required prior to the issuance of the Notice and Order of Suspension. But this is not the case. Section 1818(g)(1), by its very language, requires that the agency decide whether the crime charged is one 'involving dishonesty or breach of trust.' Given the variety and nature of state offenses, it is apparent that the agency must exercise discretion as to this issue. This discretion, in fact, is enhanced by the lack in the statute of a definition of a crime of 'dishonesty or breach of trust.' But this is not the only discretionary question posed by the statute. The statute interjects an added element of discretion by providing that the agency 'may' issue a Notice and Order of Suspension; it is not required to do so. Furthermore, when the statute is construed it appears clear that even if the agency determines that the crime charged is one involving dishonesty or a breach of trust, the agency is still given—and in fact has exercised—the discretion not to issue a Notice and Order of Suspension. In addition, it is significant for purposes of due process that no specific guidelines are provided in the statute for the exercise of this discretion. The only ascertainable guidance is the general purpose of the statute: to insure the public's confidence in the stability of the financial institution." 420 F. Supp., at 116–117 (footnotes omitted).

[5] As amended in 1978, 12 U. S. C. § 1818(g)(1) provided:

"Whenever any director or officer of an insured bank, or other person participating in the conduct of the affairs of such bank, is charged in any by enacting a new subsection (3) to give the suspended officer the right to a post-suspension hearing before the agency to demonstrate that his or her continued service would not jeopardize the interests of depositors or impair public confidence in the bank.[6] It is the adequacy of the post-suspension pro-

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information, indictment, or complaint authorized by a United States attorney, with the commission of or participation in *a crime* involving dishonesty or breach of trust *which is punishable by imprisonment for a term exceeding one year under State or Federal law*, the appropriate Federal banking agency may, *if continued service or participation by the individual may pose a threat to the interests of the bank's depositors or may threaten to impair public confidence in the bank*, by written notice served upon such director, officer, or other person, suspend him from office or prohibit him from further participation in any manner in the conduct of the affairs of the bank. A copy of such notice shall also be served upon the bank. Such suspension or prohibition shall remain in effect until such information, indictment, or complaint is finally disposed of or until terminated by the agency. In the event that a judgment of conviction with respect to such *crime* is entered against such director, officer, or other person, and at such time as such judgment is not subject to further appellate review, the agency may, *if continued service or participation by the individual may pose a threat to the interests of the bank's depositors or may threaten to impair public confidence in the bank*, issue and serve upon such director, officer, or other person an order removing him from office or prohibiting him from further participation in any manner in the conduct of the affairs of the bank except with the consent of the appropriate agency. A copy of such order shall also be served upon such bank, whereupon such director or officer shall cease to be a director or officer of such bank. A finding of not guilty or other disposition of the charge shall not preclude the agency from thereafter instituting proceedings to remove such director, officer, or other person from office or to prohibit further participation in bank affairs, pursuant to paragraph (1), (2), or (3) of subsection (e) of this section. *Any notice of suspension or order of removal issued under this paragraph shall remain effective and outstanding until the completion of any hearing or appeal authorized under paragraph (3) hereof unless terminated by the agency.*" 92 Stat. 3665–3666 (the language emphasized was added in 1978).

[6] Title 12 U. S. C. § 1818(g)(3) reads as follows:

"Within thirty days from service of any notice of suspension or order of removal issued pursuant to paragraph (1) of this subsection, the director, officer, or other person concerned may request in writing an opportunity to cedure authorized by subsection (3) that is at issue in this appeal.

II

On December 10, 1986, appellee was indicted by a federal grand jury in the Northern District of Iowa. He was charged with making false statements to the FDIC in violation of 18 U. S. C. § 1001 and with making false statements to the Farmers State Bank with the purpose of influencing the actions of the FDIC in violation of 18 U. S. C. § 1014, offenses that are punishable by imprisonment for more than one year, and that unquestionably involve dishonesty or breach of trust.[7] At the time of the indictment, appellee

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appear before the agency to show that the continued service to or participation in the conduct of the affairs of the bank by such individual does not, or is not likely to, pose a threat to the interests of the bank's depositors or threaten to impair public confidence in the bank. Upon receipt of any such request, the appropriate Federal banking agency shall fix a time (not more than thirty days after receipt of such request, unless extended at the request of the concerned director, officer, or other person) and place at which the director, officer, or other person may appear, personally or through counsel, before one or more members of the agency or designated employees of the agency to submit written materials (or, at the discretion of the agency, oral testimony) and oral argument. Within sixty days of such hearing, the agency shall notify the director, officer, or other person whether the suspension or prohibition from participation in any manner in the conduct of the affairs of the bank will be continued, terminated, or otherwise modified, or whether the order removing said director, officer or other person from office or prohibiting such individual from further participation in any manner in the conduct of the affairs of the bank will be rescinded or otherwise modified. Such notification shall contain a statement of the basis for the agency's decision, if adverse to the director, officer or other person. The Federal banking agencies are authorized to prescribe such rules as may be necessary to effectuate the purposes of this subsection." 92 Stat. 3666.

[7] Appellee was convicted on both counts. The District Court, however, set aside the 18 U. S. C. § 1014 conviction on the ground that the indictment failed to allege the essential elements of the crime. On appeal, the Court of Appeals for the Eighth Circuit affirmed the conviction under 18

was the president and a director of a federally insured bank. Thus, if the FDIC found that his continued service "[might] pose a threat to the interests of the bank's depositors or

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U. S. C. § 1001 and reversed the District Court's decision setting aside the conviction under § 1014. *United States* v. *Mallen*, 843 F. 2d 1096 (1988).

Appellee's conviction does not moot this case. A § 1818(g) suspension remains in effect until the charge against the bank official "is finally disposed of or until terminated by the agency." § 1818(g)(1). The structure of the statute makes clear that a charge is not "finally disposed of" until the opportunity for appellate review is exhausted. Section 1818(g)(1) provides that if a suspended official is convicted, the agency may remove that individual from office once the judgment is no longer "subject to further appellate review." It is unlikely that Congress intended to create a window between suspension and removal for convicted bank officials. Because appellee has not yet exhausted his opportunity for appellate review, the § 1818(g) suspension remains in effect. On May 10, 1988, the Eighth Circuit denied appellee's petition for rehearing and suggestion for rehearing en banc. He has 60 days from that date to file a petition for certiorari. See this Court's Rule 20.1.

Nor is the action mooted by appellee's suspension under 12 U. S. C. § 1829. That section provides: "Except with the written consent of the [FDIC], no person shall serve as a director, officer, or employee of an insured bank who has been convicted . . . of any criminal offense involving dishonesty or a breach of trust. . . ." On May 29, 1987, the judge presiding over appellee's criminal trial granted the FDIC's motion for a preliminary injunction pursuant to § 1829, prohibiting appellee from serving "as a director, officer or employee of the Farmers State Bank, Kanawha, Iowa." *FDIC* v. *Mallen*, 661 F. Supp. 1003, 1011 (ND Iowa 1987). In certain respects, the § 1818(g) suspension is broader in scope than the § 1829 suspension, thus giving reinstatement of the § 1818(g) suspension at least a marginal effect. For example, § 1818(j) imposes criminal penalties upon anyone subject to a § 1818(g) suspension who "votes for a director . . . of any bank." Section 1829 does not impose a similar prohibition.

Finally, counsel informs us that after the jurisdictional statement was filed in this case, the Iowa Superintendent of Banking placed the Farmers State Bank in receivership. The FDIC, which was appointed receiver, executed a "purchase and assumption" transaction, whereby the deposit liabilities of the Farmers State Bank were assumed by another bank. The building that once housed the Farmers State Bank now serves as a branch for the assuming bank. Yet, even though § 1818(g) simply authorizes the suspension of an indicted official as to a specified bank—a bank that in this [might] threaten to impair public confidence in the bank," the requirements specified in § 1818(g)(1) for a suspension order would be satisfied.

On January 20, 1987, the FDIC issued an *ex parte* order containing the necessary findings, suspending appellee as the president and as a director of the bank and prohibiting him "from further participation in any manner in the conduct of the affairs of the Bank, or any other bank insured by the FDIC."[8] App. to Juris. Statement 28a. A copy of the order was served on appellee on January 26, 1987. Four days later, appellee's attorney made a written request for "an immediate administrative hearing" at which he proposed to offer "both oral testimony and written evidence" to establish that appellee's continued service was not likely to pose a threat to the interests of the bank's depositors or to threaten public confidence in the bank. App. 26. The letter re-

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case at least arguably no longer exists—we are persuaded that the order of suspension and the District Court's nullification of that order are not moot. The Farmers State Bank has challenged the order of receivership and the "purchase and assumption" transaction. Brief for Appellant 13, n. 11. That challenge is currently before the Supreme Court of Iowa. *In the matter of the Receivership of Farmers State Bank, Kanawha, Iowa* v. *Bernau*, No. 87-1199. Because the Farmers State Bank has not yet been finally dissolved as a corporate entity and because the State Supreme Court might invalidate the receivership, we conclude that the order of suspension is not meaningless and thus further conclude that it forms an adequate prerequisite for coverage under § 1818(j). Moreover, we note that even confirmation of the receivership might not moot the order entered pursuant to § 1818(g). Mere changes in corporate structure would not necessarily terminate an otherwise effective order.

[8] In September and October 1986, extensive hearings were held to determine whether to suspend appellee from office pursuant to §§ 1818(e)(1), (e)(5). Those subsections permit the appropriate federal banking agency, after conducting a hearing, to remove or suspend a director or officer of an insured bank from office for various forms of misconduct. However, because the presiding Administrative Law Judge recused himself before rendering a decision, the proceedings were never completed. 667 F. Supp. 652, 655, n. 1 (1987).

quested that the hearing be expedited and commence no later than February 9, 1987.

After various communications with appellee's counsel, the FDIC's regional counsel, and the Administrative Law Judge who was selected to conduct the hearing, it was decided that a hearing would be held on February 18, 1987. 667 F. Supp., at 655. In those communications, the FDIC's regional counsel took the position that oral testimony would not be necessary. App. 28–30. The hearing officer, however, never had an opportunity to decide whether to receive such testimony because the administrative proceedings were interrupted by this litigation.

On February 6, 1987, appellee filed his complaint against the FDIC in the Federal District Court for the Northern District of Iowa and promptly moved for a preliminary injunction. After receiving evidence in the form of affidavits and exhibits, and after hearing oral argument—but no oral testimony—the District Court entered an order declaring the suspension "null and void" and enjoining the FDIC from enforcing it. The District Court rejected appellee's argument that the order was invalid because it was not preceded by a hearing, 667 F. Supp., at 658, but held that the post-suspension process was "constitutionally inadequate because it does not contemplate a 'prompt' disposition," *id.*, at 659, and also "because it fails to provide for a hearing at which oral evidence can be presented," *id.*, at 660.[9] The District Court

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[9] Although the District Court assumed that appellee had an unqualified right to offer oral testimony at some stage of the administrative proceeding, it expressed the opinion that such testimony could be deferred until after an adverse ruling on appellee's challenge to the suspension order. It stated:

"A hearing limited to written submissions and oral argument as described in 12 CFR Section 308.61 could pass constitutional muster if it provided for a sufficiently prompt resolution and if an adverse ruling was followed by a hearing at which oral evidence could be presented. However, neither the Code of Federal Regulations, nor the statute provide for a prompt resolumade it clear that it was expressing no opinion on the merits of the suspension; its decision rested entirely on the perceived procedural shortcomings in the post-suspension process.

III

It is undisputed that appellee's interest in the right to continue to serve as president of the bank and to participate in the conduct of its affairs is a property right protected by the Fifth Amendment Due Process Clause. The District Court and the parties correctly recognized that the FDIC cannot arbitrarily interfere with appellee's continuing employment relationship with the bank, nor with his interest as a substantial stockholder in the bank's holding company. See *Feinberg* v. *FDIC*, 173 U. S. App. D. C. 120, 125, 522 F. 2d 1335, 1340 (1975); cf. *Cleveland Bd. of Education* v. *Loudermill*, 470 U. S. 532, 538–541 (1985). It is also undisputed that the FDIC's order of suspension affected a deprivation of this property interest. Accordingly, appellee is entitled to the protection of due process of law.

"Once it is determined that due process applies, the question remains what process is due." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). Here again, we at least start with substantial agreement. Appellee does not contend that he was entitled to an opportunity to be heard prior to the order of suspension. An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation. See *Barry* v. *Barchi*, 443 U. S. 55, 64–66 (1979); *Dixon* v. *Love*, 431 U. S. 105, 112–115 (1977); *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306, 314–321 (1908). In this case, the postponement of the hearing is supported by such an interest. The legislation under scrutiny is premised on the congressional finding that

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tion of such a hearing, nor do they provide for a later opportunity to present live testimony." *Id.*, at 661.

prompt suspension of indicted bank officers may be necessary to protect the interests of depositors and to maintain public confidence in our banking institutions. See S. Rep., at 4–5; 112 Cong. Rec. 20080 (1966) (remarks of Sen. Proxmire). This interest is certainly as significant as the State's interest in preserving the integrity of the sport of horse racing, an interest that we deemed sufficiently important in *Barry* v. *Barchi*, *supra*, at 64–65, to justify a brief period of suspension prior to affording the suspended trainer a hearing. Moreover, as in *Barchi*, appellee's suspension was supported by findings that assure that the suspension was not baseless. A grand jury had determined that there was probable cause to believe that appellee had committed a felony. Such an *ex parte* finding of probable cause provides a sufficient basis for an arrest, which of course constitutes a temporary deprivation of liberty.[10] See *Baker* v. *McCollan*, 443 U. S. 137, 142, 143 (1979). It should certainly be sufficient, when coupled with the congressional finding that a prompt suspension is important to the integrity of our banking institutions, to support the order entered in this case on January 20, 1987, even though the FDIC did not provide appellee with a separate pre-suspension hearing. The three-judge District Court in the *Feinberg* case, the District Court in this case, and this Court are all in accord on that proposition.

We cannot agree with the District Court, however, that appellee was denied a sufficiently prompt post-deprivation hearing. As our cases indicate, the District Court was properly concerned about the importance of providing prompt post-deprivation procedures in situations in which an agency's discretionary impairment of an individual's property is not preceded by any opportunity for a pre-deprivation hearing. See *Barchi, supra,* at 66. However, the District Court seems to have been improperly concerned with the danger of an interminable delay by the agency, rather than by what would have happened in this case if the proceedings had not been interrupted, or indeed, what might have happened if the FDIC had been as dilatory as the statute permits. For even though there is a point at which an unjustified delay in completing a post-deprivation proceeding "would become a constitutional violation," *Cleveland Bd. of Education* v. *Loudermill*, 470 U. S., at 547, the significance of such a delay cannot be evaluated in a vacuum. In determining how long a delay is justified in affording a post-suspension hearing and decision, it is appropriate to examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken. Cf. *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 434 (1982); *Mathews* v. *Eldridge*, 424 U. S. 319, 334–335 (1976).

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[10] Section 1818(g)(1) authorizes the suspension of a bank officer "charged in any information, indictment, or complaint authorized by a United States attorney, with the commission of or participation in a crime involving dishonesty or breach of trust which is punishable by imprisonment for a term exceeding one year under State or Federal law . . . ." Federal crimes punishable by imprisonment for a term in excess of one year must be prosecuted by indictment, unless the defendant waives this right. Fed. Rules Crim. Proc. 7(a) and (b).

Section 1818(g)(3) requires the FDIC to hold a hearing within 30 days of a written request for an opportunity to appear before the agency to contest a suspension and requires that it notify the suspended officer of its decision within 60 days of the hearing. Thus, at maximum, the suspended officer receives a decision within 90 days of his or her request for a hearing. In this case, the agency reported that it would have been able to issue a written decision within 30 days after the hearing.[11] In addition, the initial hearing was scheduled

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[11] In its order denying the FDIC's motion to alter or amend its injunction, the District Court wrote:

"The Federal Deposit Insurance Corporation (FDIC) now requests that this Court alter the relief that it ordered. The FDIC proposed that it could hold a post-suspension hearing under 12 U. S. C. Section 1818(g) on to take place—had it not been interrupted by the preliminary injunction—19 days after it was formally requested.

Appellee's interest in continued employment is without doubt an important interest that ought not be interrupted without substantial justification. We have repeatedly recognized the severity of depriving someone of his or her livelihood. See *Brock* v. *Roadway Express, Inc.*, 481 U. S. 252, 263 (1987); *Loudermill*, 470 U. S., at 543. Yet, even assuming that the FDIC required the complete 90 days to hear the case and reach its decision, we are not persuaded that this exceeds permissible limits. In fact, a suspended bank officer has an interest in seeing that a decision concerning his or her continued suspension is not made with excessive haste. The statute imposes a permissive standard for continuing a suspension, and presumably, when in doubt, the agency may give greater weight to the public interest and leave the suspension in place, particularly when the suspension does not impose the additional harm of a significant, incremental injury to reputation. Through the return of the indictment, the Government has already accused the appellee of serious wrongdoing. The incidental suspension is not likely to augment this injury to the officer's reputation. We thus conclude that the 90-day period is not so long that it will always violate due process. In many cases, perhaps most, it will be justified by an important government interest coupled with factors minimizing the risk of an erroneous deprivation. Cf.

March 9, 1987; with an oral disposition within 15 days (March 26, 1987); and written disposition within 30 days (April 8, 1987). The Court finds that this proposed schedule suffers from the same difficulties that prompted this Court's decision of February 17, 1987. Mallen's criminal trial is set for March 16, 1987, and it is estimated that it will last one week. The FDIC's disposition concerning the suspension under this proposed schedule would be entered only after Mallen has 'suffered the full penalty imposed' by the suspension. This procedure does not offer a sufficiently prompt process as required under *Barry* v. *Barchi*, 443 U. S. 55, 66 . . . (1979)." 667 F. Supp., at 662–663.

id., at 546–547 (9-month delay in final decision not "unconstitutionally lengthy *per se*").

The magnitude of the public interest in a correct decision counsels strongly against any constitutional imperative that might require overly hasty decisionmaking. The same governmental interest that justifies permitting suspension prior to the opportunity to be heard extends to this analysis as well. Congress has determined that the integrity of the banking industry requires that indicted bank officers be suspended until it is determined that they do not pose a threat to the interests of the bank's depositors or threaten to undermine public confidence in the bank. To return these officers to a position of influence in the conduct of the bank's affairs prior to an opportunity to weigh the evidence carefully would threaten these interests in the same way as allowing them to remain in office from the start. Thus, the public has a strong interest in seeing the ultimate decision made in a considered and deliberate manner. Congress certainly acted within constitutional bounds in determining that 30 days might be required to set and prepare for the hearing and that in some cases another 60 days may be needed to reach a decision. The decision is a serious one and may involve complex issues and an extensive evidentiary record. See *Feinberg*, 420 F. Supp., at 120 (hearing would involve a "complex legal question" and "subtle interrelation of fact and policy").

Moreover, and perhaps most significantly, there is little likelihood that the deprivation is without basis. The returning of the indictment establishes that an independent body has determined that there is probable cause to believe that the officer has committed a crime punishable by imprisonment for a term in excess of one year. This finding is relevant in at least two important ways. First, the finding of probable cause by an independent body demonstrates that the suspension is not arbitrary. Second, the return of the indictment itself is an objective fact that will in most cases raise serious public concern that the bank is not being managed in a responsible manner. In addition, when § 1818(g) was initially enacted, Congress indicated that suspensions would be "virtually routine." S. Rep., at 2. The later amendments prompted by the *Feinberg* decision do not suggest that Congress has disavowed this expectation; rather, the standard adopted by Congress—"may pose a threat to the bank's depositors or may threaten to impair public confidence in the bank"—would appear to be easily satisfied in the case of bank officials charged with crimes involving dishonesty. One would expect that a decision not to suspend would be the exception. It is thus unlikely that any particular suspension would be erroneously imposed.

We are therefore persuaded that the congressionally recognized interest in maintaining confidence in our banking institutions, coupled with the finding of probable cause that the officer has committed a felony involving dishonesty, is sufficient ground for a regulatory suspension of up to 90 days without the benefit of a post-suspension ruling. In reaching a contrary result, the District Court attached importance to the fact that the criminal proceedings might be concluded more promptly than the FDIC proceeding. The Court reasoned that because the Speedy Trial Act requires that a federal criminal trial take place within 70 days of indictment—plus, of course, time properly excluded under the Act—the criminal trial might well take place before the FDIC need reach a decision. See 18 U. S. C. § 3161. The Court accordingly concluded that the statutorily required hearing is "a toothless remedy for the plaintiffs since the agency can postpone a disposition until after the criminal trial has concluded." 667 F. Supp., at 659. "It is a remedy only if the agency chooses for it to be a remedy." *Ibid.*

We find the possibility that a suspended officer's criminal trial may conclude before expiration of the 90-day period from request for a hearing to decision quite irrelevant. If appellee had been promptly acquitted, the basis for the suspension would have disappeared and the order would have been vacated. On the other hand, a conviction merely strengthens the case for maintaining the suspension and provides grounds for suspension under § 1829 as well.[12] The criminal trial merely constitutes a potentially intervening factor that may require that the suspension be promptly vacated; it is difficult to conceive of how this intervening factor interferes with appellee's due process rights.

Nor is this case controlled by our decision in *Barry* v. *Barchi*, 443 U. S. 55 (1979). In *Barchi*, a horse trainer's license was suspended for 15 days after a horse he trained was discovered to have had drugs in its system during a race. The state regulatory scheme raised a rebuttable presumption that the trainer either administered the drug or was negligent in protecting against such an occurrence. The trainer claimed that he neither administered the drug nor was negligent. In considering the administrative scheme, we first concluded that the State acted within the bounds of due process in suspending the trainer without a pre-suspension hearing. However, we concluded that the scheme violated due process because "it [was] as likely as not" that the trainer would irretrievably suffer the full penalty before the State would be put to its proof at a post-suspension hearing. *Id.*, at 66. In such situations, the State must assure a prompt post-suspension hearing, "without appreciable delay." *Ibid.*

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[12] Section 1829 provides:

"Except with the written consent of the Corporation, no person shall serve as a director, officer, or employee of an insured bank who has been convicted, or who is hereafter convicted, of any criminal offense involving dishonesty or a breach of trust. For each willful violation of this prohibition, the bank involved shall be subject to a penalty of not more than $100 for each day this prohibition is violated, which the Corporation may recover for its use."

Imposition of a § 1829 suspension or removal does not moot a § 1818(g) suspension. See n. 7, *supra*.

In this case by contrast, the appellee is not denied a meaningful opportunity to be heard. Rather than closing the door to the benefit of an opportunity to be heard, the possibility that the criminal trial may precede the FDIC hearing simply provides an additional forum at which to demonstrate that the suspension was unjustified. If the official is successful in the criminal proceeding, then due process has prevailed and the order of suspension must be vacated. If he or she is convicted, the order of suspension is further supported.

We also reject appellee's contention that § 1818(g) violates due process because it does not guarantee an opportunity to present oral testimony. The statute provides that the suspended officer may "submit written materials (or, at the discretion of the agency, oral testimony)" and present oral argument. § 1818(g)(3). The relevant regulation, in turn, delegates the decision whether to accept oral testimony to the hearing officer. See 12 CFR § 308.61(e) (1987). In rejecting appellee's contention we may assume that there are post-suspension proceedings under § 1818(g) in which oral testimony is essential to enable the hearing officer to make a fair appraisal of the impact of a suspended officer's continued service on the bank's security and reputation. Indeed, we may assume that this is such a case. The problem with appellee's position, however, is that he did not give the hearing officer an opportunity to decide whether to hear whatever testimony he might have adduced. No offer of proof was ever made, and thus certainly was not rejected. For all we know, the hearing officer might have accepted such evidence; or if he rejected it, he might have been entirely correct in deciding that it was merely cumulative to material that was adequately covered by written submissions or that it was otherwise unnecessary or improper. A statute such as this is not to be held unconstitutional simply because it may be applied in an arbitrary or unfair way in some hypothetical case not before the Court. There is no inexorable requirement that oral testimony must be heard in every administrative proceeding in which it is tendered.[13] See *Califano* v. *Yamasaki*, 442 U. S. 682, 696 (1979). The District Court's reliance on the absence of such a guarantee in this case was therefore misplaced.

IV

The post-suspension procedure authorized by § 1818(g)(3) is not unconstitutional on its face; nor do we find any unfairness in the FDIC's use of that procedure in this case. The District Court's preliminary injunction is accordingly reversed.

It is so ordered.

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[13] The three-judge District Court in *Feinberg* concluded that oral testimony is not constitutionally required in FDIC § 1818(g) suspension hearings:

"While the hearing need not be a trial-type hearing, notice, the opportunity to be represented by counsel, for written submissions, and for oral argument, appear mandated by the circumstances. , Certainly notice of the right to be heard is essential. *See Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 . . . (1950). The assistance of counsel is also needed in these cases, particularly since the hearing will involve a complex legal question: whether the crime charged is one involving dishonesty or breach of trust, as well as a question requiring the subtle interrelation of fact and policy: the effect upon the public of the indictees holding office and participating in the affairs of the bank. As to the presentation of live evidence, the 'nature of the relevant inquiry,' 424 U. S. 343, . . . does not seem to require any more than written submission. However, oral argument would be necessary." 420 F. Supp., at 120 (footnotes omitted).

SATTERWHITE *v.* TEXAS

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 86–6284. Argued December 8, 1987—Decided May 31, 1988

After petitioner was charged with the capital crime of murder committed during a robbery, but before he was represented by counsel, he was subjected to a court-ordered examination by a psychologist to determine his competency to stand trial, sanity at the time of the offense, and future dangerousness. Petitioner was not served with copies of the State's motion for the examination or the court's order. Petitioner was later indicted, counsel was appointed to represent him, and he was arraigned. The District Attorney, without serving a copy of his motion on defense counsel, requested a second psychiatric evaluation of petitioner as to the same matters. Without determining whether defense counsel had been notified of the State's motion, the trial court granted the motion and ordered an examination by the same psychologist and a specified psychiatrist. Later, a letter to the court from another psychiatrist (Dr. Grigson) appeared in the court file, stating that, pursuant to court order, he had examined petitioner and that he concluded that petitioner had "a severe antisocial personality disorder and is extremely dangerous and will commit future acts of violence." After petitioner was tried by a jury and convicted of capital murder, a separate sentencing procedure was conducted in accordance with Texas law before the same jury. Appearing as a witness for the State, Dr. Grigson testified, over defense counsel's objection, that in his opinion petitioner presented a continuing threat to society through acts of criminal violence. The jury answered affirmatively the special verdict questions as to whether the State had proved, beyond a reasonable doubt, (1) that the defendant's conduct causing the death was committed deliberately and with the reasonable expectation that the victim's death would result, and (2) that there was "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The court, as required by state law, sentenced petitioner to death. On petitioner's appeal of his death sentence, the Texas Court of Criminal Appeals held that the admission of Dr. Grigson's testimony violated the Sixth Amendment right, recognized in *Estelle* v. *Smith*, 451 U. S. 454, of a defendant formally charged with a capital crime to consult with counsel before submitting to a psychiatric examination designed to determine future dangerousness. However, the court concluded that the constitutional violation was subject to harmless error analysis, and that the error was harmless in this case.

Held:

1. The use, at the capital sentencing proceeding, of Dr. Grigson's testimony on the issue of future dangerousness violated the Sixth Amendment. The Court of Criminal Appeals properly determined that there had been no compliance with the Sixth Amendment requirement, set out in *Estelle* v. *Smith*, that defense counsel be given advance notice of a psychiatric examination encompassing the issue of future dangerousness. Petitioner's right to counsel had attached at the time Dr. Grigson examined him in jail, and the record does not support the State's contention that various *ex parte* motions and orders contained in the court file provided defense counsel with notice that an examination encompassing the issue of petitioner's future dangerousness would take place. Moreover, even if the *ex parte* orders and filings were timely and were applicable to Dr. Grigson's examination, they did not adequately notify defense counsel that Dr. Grigson would examine the petitioner to assess his future dangerousness. Constructive notice to defense counsel achieved by mere placement of the State's motions and the court's *ex parte* orders in the court file does not satisfy the Sixth Amendment. Pp. 254–256.

2. The harmless error rule set forth in *Chapman* v. *California*, 386 U. S. 18—which held that if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict, the error is harmless and the verdict may stand—applies to the admission of psychiatric testimony in violation of the Sixth Amendment right set out in *Estelle* v. *Smith.* Some constitutional violations—including Sixth Amendment violations that pervade the entire criminal proceeding—by their very nature cast so much doubt on the fairness on the trial process that, as a matter of law, they can never be considered harmless. However, the effect of the Sixth Amendment violation in this case is limited to the admission into evidence of Dr. Grigson's testimony. It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer. Nevertheless, a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury. Pp. 256–258.

3. The Court of Criminal Appeals improperly held that the erroneous admission of Dr. Grigson's testimony was harmless beyond a reasonable doubt. The court concluded that the admission of this testimony on the critical issue of "future dangerousness"—a probability of which must be found before a death sentence may be imposed under Texas law—was harmless because the legally admitted evidence was sufficient to support

the jury's finding of future dangerousness. However, under the *Chapman* harmless error test, the controlling question is whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Upon reviewing all the evidence at the sentencing hearing, this Court finds it impossible to say beyond a reasonable doubt that Dr. Grigson's expert testimony on the issue of petitioner's future dangerousness did not influence the sentencing jury. Pp. 258–260.

726 S. W. 2d 81, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, and SCALIA, JJ., joined. MARSHALL, J., filed an opinion concurring in part and concurring in the judgment, in which BRENNAN, J., joined, and in Part II of which BLACKMUN, J., joined, *post*, p. 260. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 267. KENNEDY, J., took no part in the consideration or decision of the case.

Richard D. Woods, by appointment of the Court, 484 U. S. 810, argued the cause for petitioner. With him on the brief was *Stephen Takas*.

Charles A. Palmer, Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *Jim Mattox*, Attorney General, *F. Scott McCown* and *Paula C. Offenhauser*, Assistant Attorneys General, and *Mary F. Keller*, Executive Assistant Attorney.*

JUSTICE O'CONNOR delivered the opinion of the Court.

In *Estelle* v. *Smith*, 451 U. S. 454 (1981), we recognized that defendants formally charged with capital crimes have a Sixth Amendment right to consult with counsel before submitting to psychiatric examinations designed to determine their future dangerousness. The question in this case is whether it was harmless error to introduce psychiatric testimony obtained in violation of that safeguard in a capital sentencing proceeding.

**Julius L. Chambers*, *Joel Berger*, and *Anthony G. Amsterdam* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* urging reversal.

I

On March 15, 1979, petitioner John T. Satterwhite was charged with the capital crime of murdering Mary Francis Davis during a robbery. The next day, before Satterwhite was represented by counsel, the presiding District Judge granted the State's request for a psychological examination to determine Satterwhite's competency to stand trial, sanity at the time of the offense, and future dangerousness. 1 Record 2. Though the State's motion and the court's order were placed in the court file, Satterwhite was not served with copies of either. Psychologist Betty Lou Schroeder examined Satterwhite pursuant to the court's order.

Satterwhite was indicted on April 4. The trial court appointed counsel to represent him and sent a copy of the appointment letter to the Bexar County District Attorney. App. 10. Satterwhite was arraigned on April 13. On April 17, the District Attorney filed a second motion requesting a psychiatric evaluation of Satterwhite's competency to stand trial, sanity at the time of the crime, and future dangerousness. App. 12. The District Attorney did not serve defense counsel with a copy of this motion. The next day, without determining whether defense counsel had been notified of the State's motion, the trial court granted the motion and ordered the Sheriff to produce Satterwhite for examination by psychologist Betty Lou Schroeder and psychiatrist John T. Holbrook. The record does not reveal when the court's order was placed in the court file.[1]

On May 18, a letter to the trial court from psychiatrist James P. Grigson, M. D., appeared in the court file. Dr.

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[1] The Assistant Attorney General represented at oral argument that the trial court's order was stamped with the Clerk's stamp showing that it was filed on April 18. Tr. of Oral Arg. 22. The copy of the April 18 order contained in the record before us, however, contains no such stamp. 1 Record 23. Defense counsel informs us that although he examined the court file twice, he did not discover the April 18 order until mid-May. Tr. of Oral Arg. 7.

Grigson wrote that, pursuant to court order, he had examined Satterwhite on May 3, 1979, in the Bexar County Jail. He further reported that, in his opinion, Satterwhite has "a severe antisocial personality disorder and is extremely dangerous and will commit future acts of violence." App. 15–16.

Satterwhite was tried by jury and convicted of capital murder. In accordance with Texas law, a separate proceeding was conducted before the same jury to determine whether he should be sentenced to death or to life imprisonment. See Tex. Code Crim. Proc. Ann., Art. 37.071(a) (Vernon Supp. 1988). The State produced Dr. Grigson as a witness in support of its case for the death penalty. Over defense counsel's objection, Dr. Grigson testified that, in his opinion, Satterwhite presented a continuing threat to society through acts of criminal violence.

At the conclusion of the evidence, the court instructed the jury to decide whether the State had proved, beyond a reasonable doubt, (1) that "the conduct of the defendant that caused the death [was] committed deliberately and with the reasonable expectation that the death of [the victim] would result," and (2) that there is "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." App. 33. Texas law provides that if a jury returns affirmative findings on both special verdict questions, "the court shall sentence the defendant to death." Tex. Code Crim. Proc. Ann., Art. 37.071(e) (Vernon Supp. 1988). The jury answered both questions affirmatively, and the trial court sentenced Satterwhite to death.

Satterwhite appealed his death sentence, arguing that the admission of Dr. Grigson's testimony violated the Sixth Amendment right to assistance of counsel recognized in *Estelle* v. *Smith, supra.* The Texas Court of Criminal Appeals agreed but concluded that the error was harmless because an average jury would have found the properly admitted evidence sufficient to sentence Satterwhite to death. 726 S. W. 2d 81, 92–93 (1986). The court acknowledged our holding that a Sixth Amendment violation tainting an entire criminal proceeding can never be considered harmless, *Holloway* v. *Arkansas*, 435 U. S. 475 (1978), but reasoned that a *per se* rule of reversal is inappropriate where, as here, the error relates only to the admission of particular evidence. 726 S. W. 2d, at 93, n. 5. We granted certiorari to decide whether harmless error analysis applies to violations of the Sixth Amendment right set out in *Estelle* v. *Smith.* 482 U. S. 905 (1987).

II

The controversy in *Estelle* v. *Smith*, *supra*, also centered on the expert testimony of Dr. James P. Grigson. In that case, as in this, Dr. Grigson appeared as a witness for the State in a capital sentencing proceeding and testified that the defendant was a severe sociopath who would continue to commit violent crimes in the future. He based his testimony upon a psychiatric examination of the defendant that he had conducted pursuant to court order. The problem in the case was that defense counsel were not given advance notice that Dr. Grigson's psychiatric examination, encompassing the issue of their client's future dangerousness, would take place. We recognized that, for a defendant charged with a capital crime, the decision whether to submit to a psychiatric examination designed to determine his future dangerousness is "'literally a life or death matter'" which the defendant should not be required to face without "'the guiding hand of counsel.'" 451 U. S., at 471, quoting *Smith* v. *Estelle*, 602 F. 2d 694, 708 (CA5 1979), and *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932). We held that defense counsel must be given advance notice of such an examination.

The Texas Court of Criminal Appeals determined that the Sixth Amendment notice requirement set out in *Estelle* v. *Smith* was not met in this case, and we agree. Since Satterwhite's indictment, arraignment, and appointment of counsel had all occurred before Dr. Grigson examined him in the Bexar County Jail, it is clear that his Sixth Amendment right to counsel had attached at the time. See *Estelle*, 451 U. S., at 469; *Kirby* v. *Illinois*, 406 U. S. 682, 688–689 (1972). The State does not contest the lower court's finding that Satterwhite did not waive his right to consult with his attorney before participating in the psychiatric examination. The State contends, however, that various *ex parte* motions and orders contained in the court file provided defense counsel with notice that an examination encompassing the issue of his client's future dangerousness would take place.[2]

We note preliminarily that the applicability and timing of some of these filings are disputed: the record does not contain a court order authorizing Dr. Grigson to examine Satterwhite, 726 S. W. 2d, at 92; and, as we have already noted, it is unclear whether the April 18 order appointing Drs. Schroeder and Holbrook was placed in the court file before Dr. Grigson performed his examination. See n. 1, *supra*. Yet even if the *ex parte* orders and filings were timely and were applicable to Dr. Grigson's examination, we agree with the Texas Court of Criminal Appeals that they did not adequately notify defense counsel that Dr. Grigson would examine the defendant to assess his future dangerousness. The Court of Criminal Appeals did not find that defense counsel had actual knowledge of the motion and order for the psychiatric examination. The State has cited no authority for its proposition that constructive notice to defense counsel achieved by mere placement of the State's motions and the court's *ex parte* orders in the court file satisfies the Sixth Amendment, and we hold that it does not. Accordingly, like the Texas Court of Criminal Appeals, we conclude that the use of Dr. Grigson's testimony at the capital sentencing proceeding on the issue of future dangerousness violated the Sixth Amendment.

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[2] The State points to the following documents in the record: (1) the State's March 16 motion for a psychological examination, App. 3–4; (2) the court's March 16 order granting that motion and appointing Dr. Betty Lou Schroeder to examine Satterwhite, *id.*, at 5; (3) the State's April 17 motion for a psychiatric examination to be conducted by Drs. Holbrook and Schroeder, *id.*, at 12–13; and (4) the court's April 18 order granting that motion, *id.*, at 14.

Our conclusion does not end the inquiry because not all constitutional violations amount to reversible error. We generally have held that if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict, the error is harmless and the verdict may stand. *Chapman* v. *California*, 386 U. S. 18, 24 (1967). The harmless error rule "'promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.'" *Rose* v. *Clark*, 478 U. S. 570, 577 (1986) (quoting *Delaware* v. *Van Arsdall*, 475 U. S. 673, 681 (1986)).

Some constitutional violations, however, by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. Sixth Amendment violations that pervade the entire proceeding fall within this category. See *Holloway* v. *Arkansas*, 435 U. S. 475 (1978) (conflict of interest in representation throughout entire proceeding); *Chapman*, *supra*, at 23, n. 8 (citing *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (total deprivation of counsel throughout entire proceeding)); *White* v. *Maryland*, 373 U. S. 59 (1963) (absence of counsel from arraignment proceeding that affected entire trial because defenses not asserted were irretrievably lost); *Hamilton* v. *Alabama*, 368 U. S. 52 (1961) (same). Since the scope of a violation such as a deprivation of the right to conflict-free representation cannot be discerned from the record, any inquiry into its effect on the outcome of the case would be purely speculative. As explained in *Holloway:*

> "In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. But in a case of

> joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. . . . Thus, any inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." 435 U. S., at 490–491 (citations omitted).

Satterwhite urges us to adopt an automatic rule of reversal for violations of the Sixth Amendment right recognized in *Estelle* v. *Smith.* He relies heavily upon the statement in *Holloway* that "when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic. *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *Hamilton* v. *Alabama,* 368 U. S. 52 (1961); *White* v. *Maryland,* 373 U. S. 59 (1963)." 435 U. S., at 489. His reliance is misplaced, however, for *Holloway, Gideon, Hamilton,* and *White* were all cases in which the deprivation of the right to counsel affected—and contaminated—the entire criminal proceeding. In this case, the effect of the Sixth Amendment violation is limited to the admission into evidence of Dr. Grigson's testimony. We have permitted harmless error analysis in both capital and noncapital cases where the evil caused by a Sixth Amendment violation is limited to the erroneous admission of particular evidence at trial. In *Milton* v. *Wainwright,* 407 U. S. 371 (1972), for example, the Court held the admission of a confession obtained in violation of *Massiah* v. *United States,* 377 U. S. 201 (1964), to be harmless beyond a reasonable doubt. And we have held that harmless error analysis applies to the admission of identification testimony obtained in violation of the right to counsel at a postindictment lineup. *Moore* v. *Illinois,* 434 U. S. 220 (1977); *Gilbert* v. *California,* 388 U. S. 263 (1967) (capital case); *United States* v. *Wade,* 388 U. S. 218 (1967). Just last year we indicated that harmless error analysis would apply in a noncapital case to constitutional error in the use of a psychological evaluation at trial. *Buchanan* v. *Kentucky*, 483 U. S. 402, 425, n. 21 (1987).

It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer. Nevertheless, we believe that a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury. Accordingly, we hold that the *Chapman* harmless error rule applies to the admission of psychiatric testimony in violation of the Sixth Amendment right set out in *Estelle* v. *Smith*.

III

Applying the *Chapman* harmless error test, we cannot agree with the Court of Criminal Appeals that the erroneous admission of Dr. Grigson's testimony was harmless beyond a reasonable doubt. A Texas court can sentence a defendant to death only if the prosecution convinces the jury, beyond a reasonable doubt, that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. Ann., Art. 37.071(b)(2) (Vernon Supp. 1988). The Court of Criminal Appeals thought that the admission of Dr. Grigson's expert testimony on this critical issue was harmless because "the properly admitted evidence was such that the minds of an average jury would have found the State's case [on future dangerousness] sufficient . . . even if Dr. Grigson's testimony had not been admitted." 726 S. W. 2d, at 93. The question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U. S., at 24.

The evidence introduced at sentencing showed that, in addition to his conviction in this case, Satterwhite had four prior convictions of crimes ranging from aggravated assault to armed robbery. Eight police officers testified that Satterwhite's reputation for being a peaceful and law-abiding citizen was bad, and Satterwhite's mother's former husband testified that Satterwhite once shot him during an argument. The State also introduced the testimony of Bexar County psychologist Betty Lou Schroeder.[3] Dr. Schroeder testified that she found Satterwhite to be a "cunning individual" and a "user of people," with an inability to feel empathy or guilt. She testified that in her opinion, Satterwhite would be a continuing threat to society through acts of criminal violence. App. 55–56.

Dr. Grigson was the State's final witness. His testimony stands out both because of his qualifications as a medical doctor specializing in psychiatry and because of the powerful content of his message. Dr. Grigson was the only licensed physician to take the stand. He informed the jury of his educational background and experience, which included teaching psychiatry at a Dallas medical school and practicing psychiatry for over 12 years. He stated unequivocably that, in his expert opinion, Satterwhite "will present a continuing threat to society by continuing acts of violence." He explained that Satterwhite has "a lack of conscience" and is "as severe a sociopath as you can be." To illustrate his point, he testified that on a scale of 1 to 10—where "ones" are mild sociopaths and "tens" are individuals with complete disregard for human life—Satterwhite is a "ten plus." Dr. Grigson concluded his testimony on direct examination with perhaps his most devastating opinion of all: he told the jury that Satterwhite was beyond the reach of psychiatric rehabilitation. *Id.*, at 72–73.

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[3] Satterwhite now contends that Dr. Schroeder's testimony was also admitted in violation of *Estelle* v. *Smith*, 451 U. S. 454 (1981). The Texas Court of Criminal Appeals explicitly noted that this claim was not raised at trial or on appeal, and we decline to consider it.

The District Attorney highlighted Dr. Grigson's credentials and conclusions in his closing argument:

> "Doctor James Grigson, Dallas psychiatrist and medical doctor. And he tells you that on a range from 1 to 10 he's ten plus. Severe sociopath. Extremely dangerous. A continuing threat to our society. Can it be cured? Well, it's not a disease. It's not an illness. That's his personality. That's John T. Satterwhite." 8 Record 2725–2726.

The finding of future dangerousness was critical to the death sentence. Dr. Grigson was the only psychiatrist to testify on this issue, and the prosecution placed significant weight on his powerful and unequivocal testimony. Having reviewed the evidence in this case, we find it impossible to say beyond a reasonable doubt that Dr. Grigson's expert testimony on the issue of Satterwhite's future dangerousness did not influence the sentencing jury. Accordingly, we reverse the judgment of the Texas Court of Criminal Appeals insofar as it affirms the death sentence, and we remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins and with whom JUSTICE BLACKMUN joins as to Part II, concurring in part and concurring in the judgment.

I

I agree with the Court that the psychiatric examination on which Dr. Grigson testified at the capital sentencing proceeding was in bald violation of *Estelle* v. *Smith*, 451 U. S. 454

(1981), and that petitioner's death sentence should be vacated. I write separately because I believe the Court errs in applying harmless-error analysis to this Sixth Amendment violation. It is my view that the unique nature of a capital sentencing determination should cause this Court to be especially hesitant ever to sanction harmless-error review of constitutional errors that taint capital sentencing proceedings, and even if certain constitutional errors might properly be subject to such harmless-error analysis, a violation of *Estelle* v. *Smith* is not such an error.

Until today's ruling, this Court never had applied harmless-error analysis to constitutional violations that taint the sentencing phase of a capital trial. In deciding to apply harmless-error analysis to the Sixth Amendment violation in this case, I believe the Court fails to adequately consider the unique nature of a capital sentencing proceeding and a sentencer's decision whether a defendant should live or die. The Court's analysis is also flawed in that it fails to accord any noticeable weight to the qualitative difference of death from all other punishments.

Unlike the determination of guilt or innocence, which turns largely on an evaluation of objective facts, the question whether death is the appropriate sentence requires a profoundly moral evaluation of the defendant's character and crime. See *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring) (a death sentence should "reflect a reasoned *moral* response to the defendant's background, character, and crime"); *Enmund* v. *Florida*, 458 U. S. 782, 801 (1982) (capital defendant's "punishment must be tailored to his personal responsibility and moral guilt"). Moreover, although much of the Court's capital jurisprudence since *Furman* v. *Georgia*, 408 U. S. 238 (1972), has been focused on guiding and channeling the decision whether death is the appropriate sentence in a specific case, the sentencer nonetheless is afforded substantial discretion. See, *e. g.*, *McCleskey* v. *Kemp*, 481 U. S. 279, 304–306 (1987); *Woodson* v.

North Carolina, 428 U. S. 280 (1976). Even in the face of overwhelming aggravating evidence, the sentencer has discretion to act with leniency and refuse to impose the death sentence. See *McCleskey*, *supra*, at 311 ("[D]iscretionary exercises of leniency [by the sentencer] are final and unreviewable").

Because of the moral character of a capital sentencing determination and the substantial discretion placed in the hands of the sentencer, predicting the reaction of a sentencer to a proceeding untainted by constitutional error on the basis of a cold record is a dangerously speculative enterprise. As the Court recognized in *Caldwell* v. *Mississippi*, 472 U. S. 320, 330 (1985), "[w]hatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record." In the same vein, an appellate court is ill equipped to evaluate the effect of a constitutional error on a sentencing determination. Such sentencing judgments, even when guided and channeled, are inherently subjective, and the weight a sentencer gives an instruction or a significant piece of evidence that is later determined to violate a defendant's constitutional rights is nowhere apparent in the record. In *McCleskey* v. *Kemp*, *supra*, the Court acknowledged that "[i]ndividual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable,'" and their collective judgment of the appropriate sentence is marked by an "inherent lack of predictability." *Id.*, at 311, quoting *Peters* v. *Kiff*, 407 U. S. 493, 503 (1972) (opinion of MARSHALL, J.). The threat of an erroneous harmless-error determination thus looms much larger in the capital sentencing context than elsewhere.

That threat is of particular concern because of the unique nature of the death sentence. The awesome severity of a sentence of death makes it qualitatively different from all other sanctions. See, *e. g.*, *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (plurality opinion). For this reason, the Court has emphasized the greater need for reliability in capital cases, and has required that "capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." *Strickland* v. *Washington*, 466 U. S. 668, 704 (1984) (BRENNAN, J., concurring in part and dissenting in part); see *California* v. *Ramos*, 463 U. S. 992, 998–999 (1983) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination"). Because of this heightened concern for reliability, "[t]ime and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Barefoot* v. *Estelle*, 463 U. S. 880, 913 (1983) (MARSHALL, J., dissenting). Harmless-error analysis impinges directly on the reliability of the capital sentencing decision by allowing a court to substitute its judgment of what the sentencer would have done in the absence of constitutional error for an actual judgment of the sentencer untainted by constitutional error.

I therefore have serious doubts whether a constitutional error that infects the sentencing phase of a capital case ever may be considered harmless beyond a reasonable doubt. But even if I could agree that harmless-error analysis is appropriate for certain constitutional errors at the sentencing phase, such a situation is not presented when the error is a violation of the Sixth Amendment under *Estelle* v. *Smith*.

II

As an initial matter, the Court in *Estelle* v. *Smith* gave no hint that harmless-error analysis ever could apply to the admission of psychiatric testimony in a capital sentencing proceeding which was based on an examination of the defendant conducted in violation of his Sixth Amendment right to counsel. After finding constitutional error, the Court simply vacated the death sentence. See 451 U. S., at 473. The failure of the Court to engage in harmless-error analysis in *Smith* is understandable, because the factors on which this Court traditionally has focused to determine whether harmless-error review is appropriate make clear that an *Estelle* v. *Smith* violation that taints a capital sentencing proceeding should lead to automatic reversal. First, the potential for actual prejudice resulting from such a violation of *Smith* is so high that a "case-by-case inquiry into prejudice is not worth the cost." *Strickland* v. *Washington, supra,* at 692. As evidenced in this case, psychiatric testimony is generally of critical importance to the sentencing determination, covering issues of rehabilitative potential, future dangerousness, and individual culpability.[1] Moreover, psychiatric testimony on these issues is clothed with a scientific authority that often carries great weight with lay juries. Cf. *Ake* v. *Oklahoma,* 470 U. S. 68, 79 (1985) (recognizing "pivotal role" psychiatry has come to play in criminal proceedings).

Second, it is difficult, if not impossible, to accurately measure the degree of prejudice arising from the failure to notify defense counsel of an impending psychiatric examination and the subsequent admission at the sentencing phase of evidence acquired from the examination. Cf. *Hamilton* v. *Alabama,* 368 U. S. 52, 55 (1961) (rejecting harmless-error analysis where "the degree of prejudice can never be known"); *Holloway* v. *Arkansas,* 435 U. S. 475, 490–491 (1978) ("[A]n inquiry into a claim of harmless error [in a case involving defense counsel's conflict of interests] would require, unlike most cases, unguided speculation"). As I discussed above, the decision whether a defendant should live or die is a discretionary, moral judgment involving a balancing of often intangible factors. Divining the effect of psychiatric testimony on a sentencer's determination whether death is an appropriate sentence is thus more in the province of soothsayers than appellate judges. In addition, contrary to the Court's claim, see *ante*, at 257, the prejudice arising from an *Estelle* v. *Smith* violation is not limited to the illegal admission of psychiatric testimony. If defense counsel is properly notified under *Smith* of the State's intention to perform a psychiatric examination, the course of subsequent proceedings may be altered significantly. For instance, defense counsel might extensively prepare his client for the examination, or perhaps advise his client to refuse to participate in the examination by the particular psychiatrist; defense counsel also might urge that a different psychiatrist perform the examination. Cf. *Estelle* v. *Smith*, 451 U. S., at 471 (defendant "was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed"). I therefore believe that any attempt to predict the effect of such an *Estelle* v. *Smith* violation would require the appellate court to engage in unguided speculation. The confluence of these factors—the likelihood of prejudice and the difficulty in evaluating the degree of that prejudice—together with the heightened concern for reliability in capital cases, convinces me that a psychiatric examination conducted in violation of *Estelle* v. *Smith*, and the later admission at a capital sentencing proceeding of psychiatric testimony based on this examination, may never be considered harmless error.[2]

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[1] The likelihood of actual prejudice arising from the illegal admission of psychiatric testimony is even greater in the context of this case. The Texas capital sentencing statute provides that, in the absence of evidence of provocation by the victim, the court "shall sentence the defendant to death" if the jury finds that the murder was "committed deliberately and with the reasonable expectation that the death of the deceased . . . would result," and that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon Supp. 1988). The psychiatrist's evaluation of future dangerousness thus purports to answer one of two questions posed by the statute.

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[2] It is also important to note that a violation of petitioner's Sixth Amendment right to counsel under *Estelle* v. *Smith* is easy to identify and, "for that reason and because the prosecution is directly responsible, easy for the government to prevent." *Strickland* v. *Washington*, 466 U. S. 668, 692 (1984). Because the error is in the control of the State and is easy to

I would have thought that this Court's decision in *Holloway* v. *Arkansas, supra,* already had settled the question whether an *Estelle* v. *Smith* violation in a capital case can ever be harmless error. In *Holloway* we stated: "'The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.' . . . Accordingly, when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic." 435 U. S., at 488–489, quoting *Glasser* v. *United States,* 315 U. S. 60, 76 (1942). We stated in *Estelle* v. *Smith, supra,* that a pretrial examination by a state psychiatrist of a capital defendant is a "critical stage" in a capital case. *Id.,* at 470. As the Court recognized in that case, "the decision to be made regarding the proposed psychiatric evaluation is 'literally a life or death matter' and is 'difficult . . . even for an attorney' because it requires 'a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of possible alternative strategies at the sentencing hearing.'" *Id.,* at 471, quoting *Smith* v. *Estelle,* 602 F. 2d 694, 708 (CA5 1979).

The Court attempts to distinguish *Holloway* by arguing that in that case the "deprivation of the right to counsel affected—and contaminated—the entire criminal proceeding." *Ante,* at 257. But *Holloway* anticipated automatic reversal not only when the deprivation affected the entire proceeding, but also when the deprivation occurred during a "critical *stage* in, at least, the prosecution of a capital offense." 435 U. S., at 489 (emphasis added). By focusing on whether the error occurred in a capital case, *Holloway* exhibited an apprecia-

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prevent, holding that such a violation will result in automatic reversal does not pose a significant burden on the State.

tion of the heightened concern for reliability in this context—something I believe today's decision fails to recognize.[3]

In the end, the Court principally relies on its belief "that a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury." *Ante*, at 258. I do not possess the same confidence in an appellate court's ability to divine the prejudice arising from such a significant error in a capital sentencing proceeding. In my view, the speculation engendered by harmless-error review of a violation of *Estelle* v. *Smith* in the context of a capital sentencing proceeding presents an intolerable danger that the death sentence will be administered erroneously. Accordingly, I do not join in that aspect of the Court's opinion sanctioning harmless-error analysis for violations of *Estelle* v. *Smith.*

JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

I join Part II of JUSTICE MARSHALL's concurring opinion because I agree that harmless-error analysis is inappropriate where the error is a Sixth Amendment violation under *Estelle* v. *Smith,* 451 U. S. 454 (1981), which results in the erroneous admission of psychiatric testimony in a capital-sentencing proceeding. The situation is particularly acute where, under a system such as that of Texas, the jury must answer the very question that the psychiatrist purports to answer. I am fortified in this conclusion by my continuing concern—wholly apart from the testimony of the ubiquitous Doctor Grigson in Texas capital cases—about the reliability of psychiatric testimony as to a defendant's future dangerousness (wrong two times out of three). See *Barefoot* v. *Estelle*, 463 U. S. 880, 916 (1983) (dissenting opinion).

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[3] Moreover, in the present case the Court is unable to cite a single capital case since our decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972), in which we have ignored *Holloway*'s reasoning and have applied harmless-error analysis to a Sixth Amendment violation occurring during a critical stage of the proceedings. The Court cites dicta in *Buchanan* v. *Kentucky*, 483 U. S. 402, 425, n. 21 (1987), as an indication of the Court's willingness to apply harmless-error analysis to the admission of psychological testimony in violation of *Estelle* v. *Smith*, 451 U. S. 454 (1981). But the petitioner in *Buchanan* was not prosecuted for a capital offense, and thus the Court's indication in that case that harmless-error analysis might apply to the illegal admission of psychological testimony has little relevance in the present context.

NEW ENERGY COMPANY OF INDIANA *v.* LIMBACH, TAX COMMISSIONER OF OHIO, ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO

No. 87-654. Argued March 29, 1988—Decided May 31, 1988

An Ohio statute awards a tax credit against the Ohio motor vehicle fuel sales tax for each gallon of ethanol sold (as a component of gasohol) by fuel dealers, but only if the ethanol is produced in Ohio or, if produced in another State, to the extent that State grants similar tax advantages to ethanol produced in Ohio. Appellant, an Indiana limited partnership, manufactures ethanol in Indiana, which has no sales tax exemption for ethanol, wherefore appellant's ethanol sold in Ohio is ineligible for the Ohio tax credit. Appellant sought declaratory and injunctive relief in the Ohio Court of Common Pleas of Franklin County, alleging that the Ohio tax credit violates the Commerce Clause of the Federal Constitution by discriminating against out-of-state ethanol producers. The court denied relief; the Ohio Court of Appeals and the Ohio Supreme Court affirmed.

Held: The Ohio statute discriminates against interstate commerce in violation of the Commerce Clause. Pp. 273–280.

(a) The Clause's "negative" aspect, directly limiting the States' power to discriminate against interstate commerce, prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. Thus, state statutes, such as Ohio's, that clearly discriminate against interstate commerce are invalid, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. There is no merit to appellees' argument that the availability of the Ohio tax credit to some out-of-state manufacturers (those in States that give tax advantages to Ohio-produced ethanol) shows that the Ohio provision is not discriminatory but, rather, is likely to promote interstate commerce by encouraging other States to enact similar tax advantages that will spur the interstate sale of ethanol. Discriminatory tax treatment for out-of-state goods is no more validated by the promise to remove it if reciprocity is accepted than would be the categorical exclusion of out-of-state goods. Nor is there any merit to appellees' argument that the Ohio statute should not be considered discrimination against interstate commerce because apparently only one Ohio ethanol manufacturer (appellee South Point Ethanol) is benefited by it and only one out-of-state manufacturer (appellant) is clearly disadvantaged. Where discrimination is patent, as it is here, neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown. Moreover, the "market participant" doctrine—under which the negative Commerce Clause's limitations apply only to a State's acting in its governmental capacity, not to its acting in the capacity of a market participant—has no application here. The state action at issue is not Ohio's purchase or sale of ethanol, but its assessment and computation of taxes. Although the tax credit scheme has the purpose and effect of subsidizing a particular industry, that does not transform it into a form of state participation in the free market. Pp. 273–278.

(b) The clear discrimination in this case cannot be validated by the justifications advanced by appellees: health and commerce. Appellees argue that the Ohio statute encourages use of ethanol to reduce harmful exhaust emissions, both in Ohio and in surrounding States whose polluted atmosphere may reach Ohio. There is no reason to suppose, however, that ethanol produced in a State that does not offer tax advantages to ethanol produced in Ohio is less healthy, and thus should have its importation into Ohio suppressed by denial of the otherwise standard tax credit; and ethanol use outside Ohio is just as effectively fostered by other States' subsidizing ethanol production or sale in some fashion other than by giving a tax credit to Ohio-produced ethanol. Thus, health is not the purpose of the Ohio provision, but is merely an occasional and accidental effect of achieving what is its purpose, favorable tax treatment for Ohio-produced ethanol. Essentially the same reasoning applies to the asserted justification that Ohio's reciprocity requirement is designed to increase commerce in ethanol by encouraging other States to enact ethanol subsidies. Pp. 278–280.

32 Ohio St. 3d 206, 513 N. E. 2d 258, reversed.

SCALIA, J., delivered the opinion for a unanimous Court.

Herman Schwartz argued the cause for appellant. With him on the briefs was *David J. Young*.

Richard C. Farrin, Assistant Attorney General of Ohio, argued the cause for appellees. With him on the brief for appellees Limbach et al. was *Anthony J. Celebrezze, Jr.*, Attorney General. *David C. Crago* and *Karen B. Mozenter* filed a brief for appellee South Point Ethanol.*

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*Briefs of *amici curiae* urging affirmance were filed for the State of Idaho et al. by *Michael H. Gottesman*, *Peter O. Shinevar*, *James T. Jones*, Attorney General of Idaho, *Tam B. Ormiston*, Assistant Attorney General of Iowa, *Robert T. Stephan*, Attorney General of Kansas, and *Hubert H.*

JUSTICE SCALIA delivered the opinion of the Court.

Appellant New Energy Company of Indiana has challenged the constitutionality of Ohio Rev. Code Ann. § 5735.145(B) (1986), a provision that awards a tax credit against the Ohio motor vehicle fuel sales tax for each gallon of ethanol sold (as a component of gasohol) by fuel dealers, but only if the ethanol is produced in Ohio or in a State that grants similar tax advantages to ethanol produced in Ohio. The question presented is whether § 5735.145(B) discriminates against interstate commerce in violation of the Commerce Clause, U. S. Const., Art. I, § 8, cl. 3.

I

Ethanol, or ethyl alcohol, is usually made from corn. In the last decade it has come into widespread use as an automotive fuel, mixed with gasoline in a ratio of 1 to 9 to produce what is called gasohol. The interest in ethanol emerged in reaction to the petroleum market dislocations of the early 1970's. The product was originally promoted as a means of achieving energy independence while providing a market for surplus corn; more recently, emphasis has shifted to its environmental advantages as a replacement for lead in enhancing fuel octane. See United States Department of Agriculture, Ethanol: Economic and Policy Tradeoffs 1 (1988). Ethanol was, however (and continues to be), more expensive than gasoline, and the emergence of ethanol production on a commercial scale dates from enactment of the first federal subsidy, in the form of an exemption from federal motor fuel excise taxes, in 1978. See Energy Tax Act of 1978, Pub. L. 95–618, § 221, 92 Stat. 3185, codified, as amended, at 26 U. S. C. §§ 4041, 4081 (1982 ed. and Supp. IV). Since then, many States, particu-

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Humphrey III, Attorney General of Minnesota; for the State of Illinois by *Neil F. Hartigan*, Attorney General, *Shawn W. Denney*, Solicitor General, and *Rosalyn B. Kaplan* and *Michael Wynne*, Assistant Attorneys General; and for the National Governors' Association et al. by *Benna Ruth Solomon* and *Stuart A. Smith*.

larly those in the grain-producing areas of the country, have enacted their own ethanol subsidies. See United States General Accounting Office, Importance and Impact of Federal Alcohol Fuel Tax Incentives 5 (1984). Ohio first passed such a measure in 1981, providing Ohio gasohol dealers a credit of so many cents per gallon of ethanol used in their product against the Ohio motor vehicle fuel sales tax payable on both ethanol and gasoline. This credit was originally available without regard to the source of the ethanol. See Act of June 10, 1981, § 1, 1981–1982 Ohio Leg. Acts 1693, 1731–1732. In 1984, however, Ohio enacted § 5735.145(B), which denies the credit to ethanol coming from States that do not grant a tax credit, exemption, or refund to ethanol from Ohio, or, if a State grants a smaller tax advantage than Ohio's, granting only an equivalent credit to ethanol from that State.[1]

Appellant is an Indiana limited partnership that manufactures ethanol in South Bend, Indiana, for sale in several States, including Ohio. Indiana repealed its tax exemption for ethanol, effective July 1, 1985, see Act of Mar. 5, 1984, §§ 4, 5, 8, 1984 Ind. Acts 189, 194–195, at which time it also passed legislation providing a direct subsidy to Indiana ethanol producers (the sole one of which was appellant). See Ind. Code §§ 4–4–10.1 to 4–4–10.8 (Supp. 1987). Thus, by reason of Ohio's reciprocity provision, appellant's ethanol sold in Ohio became ineligible for the Ohio tax credit. Appellant sought declaratory and injunctive relief in the Court of Common Pleas of Franklin County, Ohio, alleging that § 5735.145(B) violated the Commerce Clause by discriminating against out-of-state ethanol producers to the advantage of in-state industry.[2] The court denied relief, and the Ohio Court of Appeals affirmed. A divided Ohio Supreme Court initially reversed, finding that § 5735.145(B) discriminated without adequate justification against products of out-of-state origin, and shielded Ohio producers from out-of-state competition. The Ohio Supreme Court then granted appellees' motion for rehearing and reversed itself, a majority of the court finding that the provision was not protectionist or unreasonably burdensome. 32 Ohio St. 3d 206, 513 N. E. 2d 258 (1987). We noted probable jurisdiction. 484 U. S. 984 (1987).

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[1] Section 5735.145(B) provides:

"The qualified fuel otherwise eligible for the qualified fuel credit shall not contain ethanol produced outside Ohio unless the tax commissioner determines that the fuel claimed to be eligible for credit contains ethanol produced in a state that also grants an exemption, credit or refund from such state's motor vehicle fuel excise tax or sales tax for similar fuel containing ethanol produced in Ohio; provided however, that such credit shall not exceed the amount of the credit allowable for qualified fuel containing ethanol produced in Ohio."

This provision was passed in 1984 and took effect on January 1, 1985. After this litigation began, Ohio again amended its ethanol credit statute to reduce the amount of the credit and scheduled it for elimination in 1993. See Ohio Rev. Code Ann. § 5735.145 (Supp. 1987).

II

It has long been accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce. See, *e. g., Hughes* v. *Oklahoma,* 441 U. S. 322, 326 (1979); *H. P. Hood & Sons, Inc.* v. *Du Mond,* 336 U. S. 525, 534–535 (1949); *Welton* v. *Missouri,* 91 U. S. 275 (1876). This "negative" aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. See, *e. g., Bacchus Imports, Ltd.* v. *Dias,* 468 U. S. 263, 270–273 (1984); *H. P. Hood & Sons, supra,* at 532–533; *Guy* v. *Baltimore,* 100 U. S. 434, 443 (1880). Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down, see, *e. g., Sporhase* v. *Nebraska ex rel. Douglas,* 458 U. S. 941 (1982); *Lewis* v. *BT Investment Managers, Inc.,* 447 U. S. 27 (1980); *Dean Milk Co.* v. *Madison,* 340 U. S. 349 (1951), unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism, see, *e. g., Maine* v. *Taylor,* 477 U. S. 131 (1986).

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[2] Appellant also argued there, as it has here, that § 5735.145(B) was an excessive burden on commerce under the test set forth in *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137, 142 (1970). To the extent that claim requires separate analysis we find it unnecessary to reach it, in light of our disposition of the discrimination claim. Appellant also alleged in the state courts violations of the Equal Protection Clause and the Privileges and Immunities Clause of the Fourteenth Amendment; those challenges are not at issue in this appeal.

The Ohio provision at issue here explicitly deprives certain products of generally available beneficial tax treatment because they are made in certain other States, and thus on its face appears to violate the cardinal requirement of nondiscrimination. Appellees argue, however, that the availability of the tax credit to some out-of-state manufacturers (those in States that give tax advantages to Ohio-produced ethanol) shows that the Ohio provision, far from discriminating against interstate commerce, is likely to promote it, by encouraging other States to enact similar tax advantages that will spur the interstate sale of ethanol. We rejected a similar contention in an earlier "reciprocity" case, *Great Atlantic & Pacific Tea Co.* v. *Cottrell,* 424 U. S. 366 (1976). The regulation at issue there permitted milk from out of State to be sold in Mississippi only if the State of origin accepted Mississippi milk on a reciprocal basis. Mississippi put forward, among other arguments, the assertion that "the reciprocity requirement is in effect a free-trade provision, advancing the identical national interest that is served by the Commerce Clause." *Id.,* at 378. In response, we said that "Mississippi may not use the threat of economic isolation as a weapon to force sister States to enter into even a desirable reciprocity agreement." *Id.,* at 379. More recently, we characterized a Nebraska reciprocity requirement for the export of ground water from the State as "facially discriminatory legislation" which merited "'strictest scrutiny.'" *Sporhase* v. *Nebraska ex rel. Douglas, supra,* at 958, quoting *Hughes* v. *Oklahoma, supra,* at 337.

It is true that in *Cottrell* and *Sporhase* the effect of a State's refusal to accept the offered reciprocity was total elimination of all transport of the subject product into or out of the offering State; whereas in the present case the only effect of refusal is that the out-of-state product is placed at a substantial commercial disadvantage through discriminatory tax treatment. That makes no difference for purposes of Commerce Clause analysis. In the leading case of *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U. S. 511 (1935), the New York law excluding out-of-state milk did not impose an absolute ban, but rather allowed importation and sale so long as the initial purchase from the dairy farmer was made at or above the New York State-mandated price. In other words, just as the appellant here, in order to sell its product in Ohio, only has to cut its profits by reducing its sales price below the market price sufficiently to compensate the Ohio purchaser-retailer for the forgone tax credit, so also the milk wholesaler-distributor in *Baldwin,* in order to sell its product in New York, only had to cut its profits by increasing its purchase price above the market price sufficiently to meet the New York-prescribed minimum. We viewed the New York law as "an economic barrier against competition" that was "equivalent to a rampart of customs duties." *Id.,* at 527. Similarly, in *Hunt* v. *Washington Apple Advertising Comm'n,* 432 U. S. 333, 349–351 (1977), we found invalid under the Commerce Clause a North Carolina statute that did not exclude apples from other States, but merely imposed additional costs upon Washington sellers and deprived them of the commercial advantage of their distinctive grading system. The present law likewise imposes an economic disadvantage upon out-of-state sellers; and the promise to remove that if reciprocity is accepted no more justifies disparity of treatment than it would justify categorical exclusion. We have indicated that reciprocity requirements are not *per se* unlawful. See *Cottrell, supra,* at 378. But the case we cited for that proposition, *Kane* v. *New Jersey,* 242 U. S. 160, 167–168 (1916), discussed a context in which, if a State offered the reciprocity did not accept it, the consequence was, to be sure, *less favored* treatment for its citizens, but nonetheless treatment that complied with the minimum requirements of the Commerce Clause. Here, quite to the contrary, the threat used to induce Indiana's acceptance is, in effect, taxing a product made by its manufacturers at a rate higher than the same product made by Ohio manufacturers, without (as we shall see) justification for the disparity.

Appellees argue that § 5735.145(B) should not be considered discrimination against interstate commerce because its practical scope is so limited. Apparently only one Ohio ethanol manufacturer exists (appellee South Point Ethanol) and only one out-of-state manufacturer (appellant) is clearly disadvantaged by the provision. Our cases, however, indicate that where discrimination is patent, as it is here, neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown. For example, in *Bacchus Imports, Ltd.* v. *Dias, supra,* we held unconstitutional under the Commerce Clause a special exemption from Hawaii's liquor tax for certain locally produced alcoholic beverages (okolehao and fruit wine), even though other locally produced alcoholic beverages were subject to the tax. *Id.*, at 265, 271. And in *Lewis* v. *BT Investment Managers, Inc., supra,* we held unconstitutional a Florida statute that excluded from certain business activities in Florida not all out-of-state entities, but only out-of-state bank holding companies, banks, or trust companies. In neither of these cases did we consider the size or number of the in-state businesses favored or the out-of-state businesses disfavored relevant to our determination. Varying the strength of the bar against economic protectionism according to the size and number of in-state and out-of-state firms affected would serve no purpose except the creation of new uncertainties in an already complex field.

Appellees contend that even if § 5735.145(B) is discriminatory, the discrimination is not covered by the Commerce Clause because of the so-called market-participant doctrine. That doctrine differentiates between a State's acting in its distinctive governmental capacity, and a State's acting in the more general capacity of a market participant; only the former is subject to the limitations of the negative Commerce Clause. See *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 806–810 (1976). Thus, for example, when a State chooses to manufacture and sell cement, its business methods, including those that favor its residents, are of no greater constitutional concern than those of a private business. See *Reeves, Inc.* v. *Stake*, 447 U. S. 429, 438–439 (1980).

The market-participant doctrine has no application here. The Ohio action ultimately at issue is neither its purchase nor its sale of ethanol, but its assessment and computation of taxes—a primeval governmental activity. To be sure, the tax credit scheme has the purpose and effect of subsidizing a particular industry, as do many dispositions of the tax laws. That does not transform it into a form of state participation in the free market. Our opinion in *Alexandria Scrap, supra,* a case on which appellees place great reliance, does not remotely establish such a proposition. There we examined, and upheld against Commerce Clause attack on the basis of the market-participant doctrine, a Maryland cash subsidy program that discriminated in favor of in-state auto-hulk processors. The purpose of the program was to achieve the removal of unsightly abandoned autos from the State, *id.*, at 796–797, and the Court characterized it as proprietary rather than regulatory activity, based on the analogy of the State to a private purchaser of the auto hulks, *id.*, at 808–810. We have subsequently observed that subsidy programs unlike that of *Alexandria Scrap* might not be characterized as proprietary. See *Reeves, Inc., supra,* at 440, n. 14. We think it clear that Ohio's assessment and computation of its fuel sales tax, regardless of whether it produces a subsidy, cannot plausibly be analogized to the activity of a private purchaser.

It has not escaped our notice that the appellant here, which is eligible to receive a cash subsidy under Indiana's program for in-state ethanol producers, is the potential beneficiary of a scheme no less discriminatory than the one that it attacks, and no less effective in conferring a commercial advantage over out-of-state competitors. To believe the Indiana scheme is valid, however, is not to believe that the Ohio scheme must be valid as well. The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce.* Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does. Of course, even if the Indiana subsidy were invalid, retaliatory violation of the Commerce Clause by Ohio would not be acceptable. See *Cottrell*, 424 U. S., at 379–380.

III

Our cases leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. See, *e. g.*, *Maine* v. *Taylor*, 477 U. S., at 138, 151; *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U. S., at 958; *Hughes* v. *Oklahoma*, 441 U. S., at 336–337; *Dean Milk Co.* v. *Madison*, 340 U. S., at 354. This is perhaps just another way of saying that what may appear to be a "discriminatory" provision in the constitutionally prohibited sense—that is, a protectionist enactment—may on closer analysis not be so. However it be put, the standards for such justification are high. Cf. *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978) ("[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected"); *Hughes* v. *Oklahoma, supra,* at 337 ("[F]acial discrimination by itself may be a fatal defect" and "[a]t a minimum . . . invokes the strictest scrutiny").

Appellees advance two justifications for the clear discrimination in the present case: health and commerce. As to the first, they argue that the provision encourages use of ethanol (in replacement of lead as a gasoline octane-enhancer) to reduce harmful exhaust emissions, both in Ohio itself and in surrounding States whose polluted atmosphere may reach Ohio. Certainly the protection of health is a legitimate state goal, and we assume for purposes of this argument that use of ethanol generally furthers it. But § 5735.145(B) obviously does not, except perhaps by accident. As far as ethanol use in Ohio itself is concerned, there is no reason to suppose that ethanol produced in a State that does not offer tax advantages to ethanol produced in Ohio is less healthy, and thus should have its importation into Ohio suppressed by denial of the otherwise standard tax credit. And as far as ethanol use outside Ohio is concerned, surely that is just as effectively fostered by other States' subsidizing ethanol production or sale in some fashion other than giving a tax credit to Ohio-produced ethanol; but these helpful expedients do not qualify for the tax credit. It could not be clearer that health is not the purpose of the provision, but is merely an occasional and accidental effect of achieving what is its purpose, favorable tax treatment for *Ohio*-produced ethanol.[3] Essentially the same reasoning also responds to appellees' second (and related) justification for the discrimination, that the reciprocity requirement is designed to increase commerce in ethanol by encouraging other States to enact ethanol subsidies. What is encouraged is not ethanol subsidies in general, but only favorable treatment for Ohio-produced ethanol. In sum, appellees' health and commerce justifications amount to no more than implausible speculation, which does not suffice to validate this plain discrimination against products of out-of-state manufacture.

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[3] We do not interpret the trial court's acceptance of appellees' proposed finding of fact of April 10, 1985, as a judicial finding that protecting health was in fact a purpose of the Ohio General Assembly, rather than merely one of several conceivable purposes for the enactment. In any event, a subjective purpose that has so little rational relationship to the provision in question is not merely implausible but, even if true, inadequate to validate patent discrimination against interstate commerce.

* * *

For the reasons stated, the judgment of the Ohio Supreme Court is

Reversed.

K MART CORP. *v.* CARTIER, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86–495. Argued October 6, 1987—Reargued April 26, 1988—Decided May 31, 1988*

A gray-market good is a foreign-manufactured good, bearing a valid United States trademark, that is imported without the consent of the United States trademark holder. The gray market arises in three general contexts. In case 1, despite a domestic firm's having purchased from an independent foreign firm the rights to register and use the latter's trademark as a United States trademark and to sell its foreign-manufactured products here, the foreign firm imports the trademarked goods and distributes them here, or sells them abroad to a third party who imports them here. In case 2, after the United States trademark for goods manufactured abroad is registered by a domestic firm that is a subsidiary of (case 2a), the parent of (case 2b), or the same as (case 2c), the foreign manufacturer, goods bearing a trademark that is identical to the United States trademark are imported. In case 3, the domestic holder of a United States trademark authorizes an independent foreign manufacturer to use that trademark in a particular foreign location. Again, the foreign manufacturer or a third party imports and distributes the foreign-made goods. Section 526 of the Tariff Act of 1930 prohibits the importation of "any merchandise of foreign manufacture" bearing a trademark "owned by" a citizen of, or by "a corporation . . . organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States," unless written consent of the trademark owner is produced at the time of entry. The Customs Service's implementing regulation permits the entry of goods manufactured abroad by the "same person" who holds the United States trademark or by a person who is "subject to common control" with the United States trademark holder, 19 CFR §§ 133.21(c)(1), (2); and permits importation where the foreign manufacturer has received the United States trademark owner's authorization to use its trademark, 19 CFR § 133.21(c)(3). Respondent Coalition to Preserve the Integrity of

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*Together with No. 86–624, *47th Street Photo, Inc.* v. *Coalition to Preserve the Integrity of American Trademarks et al.*, and No. 86–625, *United States et al.* v. *Coalition to Preserve the Integrity of American Trademarks et al.*, also on certiorari to the same court.

American Trademarks and two of its members filed suit against the Government seeking injunctive and declaratory relief, asserting that the regulation is inconsistent with § 526 and therefore invalid. The Federal District Court upheld the regulation, but the Court of Appeals reversed, ruling that the regulation was an unreasonable administrative interpretation of § 526.

Held: The judgment is affirmed in part and reversed in part.

252 U. S. App. D. C. 342, 790 F. 2d 903, affirmed in part and reversed in part.

JUSTICE KENNEDY delivered the opinion of the Court as to Parts I, II–A, and II–C, concluding that:

1. In determining whether a challenged regulation is consistent with the statute it implements, courts must ascertain the statute's plain meaning by looking to the particular language at issue and the language and design of the statute as a whole. If the statute is clear and unambiguous, courts must give effect to Congress' unambiguously expressed intent, and cannot pay deference to a contrary agency interpretation. However, if the statute is silent or ambiguous with respect to the specific issue addressed by the regulation, a reviewing court must give deference to the agency's interpretation if it does not conflict with the statute's plain meaning. Pp. 291–292.

2. Allowing the importation of foreign made goods where the United States trademark owner has authorized the use of the mark, 19 CFR § 133.21(c)(3), is in conflict with the unequivocal language of § 526 and cannot stand. The regulation denies a domestic trademark holder statutory protection in the case 3 context. Under no reasonable construction of the statutory language can goods made in a foreign country by an independent foreign manufacturer be removed from the purview of the statute. However, the regulation subsection is severable, since its severance and invalidation will not impair the function of the statute as a whole and there is no indication that the regulation would not have been passed but for its inclusion. Pp. 293–294.

JUSTICE KENNEDY, joined by JUSTICE WHITE, concluded in Part II–B that the regulation's allowance of imports from companies under common control, 19 CFR §§ 133.21(c)(1), (2), is consistent with § 526 and is therefore valid because it is a permissible construction designed to resolve statutory ambiguities. The statutory phrase "owned by" is sufficiently ambiguous to permit parallel importation in the case 2a foreign-parent, domestic-subsidiary context, since the phrase does not reveal which of the affiliated entities can be said to "own" the United States trademark if the domestic subsidiary is wholly owned by its foreign parent. Similarly, the ambiguity contained in the statutory phrase "merchandise of foreign manufacture" suffices to sustain the regulation as it applies to cases 2b and 2c. It is possible to interpret the phrase to mean goods manufactured (1) in a foreign country, (2) by a foreign company, or (3) in a foreign country by a foreign company. Thus, the agency is entitled to choose any reasonable definition and to say that goods manufactured by a foreign subsidiary or division of a domestic company are not goods "of foreign manufacture." Pp. 292–293.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL and JUSTICE STEVENS, agreeing that the common-control exception is consistent with § 526, concluded that:

1. Section 526's language does not clearly cover affiliates of foreign manufacturers. Pp. 297–299.

(a) The section's protectionist language and structure bespeak a congressional intent to extend protection only to domestic interests and not to affiliates of foreign manufacturers. Much of the limiting language would be pointless if a foreign manufacturer could insulate itself by the simple device of incorporating a shell domestic subsidiary and transferring to it a single asset—the United States trademark. Pp. 297–298.

(b) The undefined statutory phrase "owned by" is ambiguous when applied in the case 2a context, because it cannot be confidently discerned which of the entities involved owns the trademark. Whereas the trademark must be "owned by" a domestic firm to fall within § 526's ban, it is the foreign parent corporation—not the domestic subsidiary whose every decision it controls—that better fits the bill as the true owner of any property that the subsidiary nominally possesses. Similarly, § 526 does not unambiguously cover cases 2b and 2c, because it is unclear whether merchandise manufactured abroad by a division or a subsidiary of a domestic firm is "merchandise of foreign manufacture." If that phrase is interpreted to mean "merchandise manufactured in a *foreign country*," § 526's ban would apply. However, if the phrase is construed to mean "merchandise manufactured by a *foreigner*," § 526's coverage is not as clear. A domestic firm that establishes a manufacturing division abroad (case 2c) cannot be said to be a foreigner, and it is at the very least reasonable to view as "American" the foreign subsidiary of a domestic firm (case 2b). Pp. 298–299.

2. The common-control exception is consistent with § 526's purpose and legislative history, which confirm that if Congress had any intent as to the section's application to affiliates of foreign manufacturers, it was that they ought not enjoy § 526's protection. The major stimulus for the enactment of § 526 was the congressionally perceived inequity of *A. Bourjois & Co.* v. *Katzel*, 275 F. 539, which declined to protect a case 1 trademark holder. However, the profound differences between the equities presented in the case 1 and case 2 contexts—which result

from the fact that the case 1 trademark holder has a much greater investment at stake, but much less control over parallel importation and foreign sales to third parties, than its case 2 counterpart—furnish perfectly rational reasons for Congress' distinguishing between the two situations. Pp. 300–309.

3. The deference owed longstanding administrative interpretations further buttresses the conclusion that the common-control exception is consistent with § 526. While the precise language of the importation bar has varied over the years, the Customs Service has for 50 years adhered to the exception's basic premise that § 526 does not require exclusion of all gray-market goods in the context of affiliated entities. Such a longstanding administrative practice should not be lightly overturned, particularly where, as here, an immense domestic retail industry has developed in reliance upon it. Pp. 309–312.

KENNEDY, J., announced the judgment of the Court and delivered an opinion of the Court with respect to Parts I and II–A, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined, an opinion of the Court with respect to Part II–C, in which REHNQUIST, C. J., and BLACKMUN, O'CONNOR, and SCALIA, JJ., joined, and an opinion with respect to Part II–B, in which WHITE, J., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and STEVENS, JJ., joined, and in Part IV of which WHITE, J., joined, *post*, p. 295. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., and BLACKMUN and O'CONNOR, JJ., joined, *post*, p. 318.

Deputy Solicitor General Cohen reargued the cause for petitioners in No. 86–625. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Assistant Attorney General Spears, Jeffrey P. Minear, David M. Cohen, Robert V. Zener,* and *Alfonso Robles. Nathan Lewin* reargued the cause for petitioners in Nos. 86–495 and 86–624. With him on the briefs for petitioner in No. 86–624 was *Jamie S. Gorelick. Robert W. Steele* argued the cause for petitioners in Nos. 86–495 and 86–624 on the original argument. With him on the briefs for petitioner in No. 86–495 were *Robert E. Hebda* and *James C. Tuttle.*

William H. Allen reargued the cause for respondents. With him on the briefs were *Eugene A. Ludwig*, *Scott D. Gilbert*, and *Elizabeth V. Foote*.†

JUSTICE KENNEDY announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, and II–C, and an opinion with respect to Part II–B, in which WHITE, J., joined.

A gray-market good is a foreign-manufactured good, bearing a valid United States trademark, that is imported without the consent of the United States trademark holder. These cases present the issue whether the Secretary of the Treasury's regulation permitting the importation of certain gray-market goods, 19 CFR § 133.21 (1987), is a reasonable agency interpretation of § 526 of the Tariff Act of 1930 (1930 Tariff Act), 46 Stat. 741, as amended, 19 U. S. C. § 1526.

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†Briefs of *amici curiae* urging reversal were filed for the State of Washington by *Kenneth O. Eikenberry*, Attorney General, and *John G. Hennen*, Senior Assistant Attorney General; for the American Free Trade Association by *Stephen Kurzman*, *Robert Ullman*, and *Steven R. Trost;* for the Consumers Union of U. S., Inc., by *Alan Mark Silbergeld;* for Darby Dental Supply Co. et al. by *Robert V. Marrow;* for the National Association of Catalog Showroom Merchandisers by *Richard B. Kelly* and *Thomas P. Mohen;* for the National Mass Retailing Institute by *William D. Coston* and *Robert J. Verdisco;* and for Progress Trading Co. by *William F. Sondericker*, *Robert L. Hoegle*, and *Frank W. Gaines, Jr.*

Briefs of *amici curiae* urging affirmance were filed for American Cyanamid Co. et al. by *David Ladd* and *Thomas W. Kirby;* for the American Intellectual Property Law Association, Inc., by *Neil A. Smith;* for Duracell Inc. by *James N. Bierman*, *Jay N. Varon*, *Sheila McDonald Gill*, and *Gregg A. Dwyer;* for Lever Brothers Co. by *Robert P. Devlin;* for the Motor Vehicle Manufacturers Association of the United States, Inc., by *William H. Crabtree;* for the United States Trademark Association by *Marie V. Driscoll;* and for Yamaha International Corp. et al. by *Robert E. Wagner* and *Robert E. Browne.*

Harold C. Wegner, *Barry E. Bretschneider*, *Donald R. Dinan*, *Charles F. Schill*, and *Albert P. Halluin* filed a brief for Cetus Corp. as *amicus curiae.*

I

A

The gray market arises in any of three general contexts. The prototypical gray-market victim (case 1) is a domestic firm that purchases from an independent foreign firm the rights to register and use the latter's trademark as a United States trademark and to sell its foreign-manufactured products here. Especially where the foreign firm has already registered the trademark in the United States or where the product has already earned a reputation for quality, the right to use that trademark can be very valuable. If the foreign manufacturer could import the trademarked goods and distribute them here, despite having sold the trademark to a domestic firm, the domestic firm would be forced into sharp intrabrand competition involving the very trademark it purchased. Similar intrabrand competition could arise if the foreign manufacturer markets its wares outside the United States, as is often the case, and a third party who purchases them abroad could legally import them. In either event, the parallel importation, if permitted to proceed, would create a gray market that could jeopardize the trademark holder's investment.

The second context (case 2) is a situation in which a domestic firm registers the United States trademark for goods that are manufactured abroad by an affiliated manufacturer. In its most common variation (case 2a), a foreign firm wishes to control distribution of its wares in this country by incorporating a subsidiary here. The subsidiary then registers under its own name (or the manufacturer assigns to the subsidiary's name) a United States trademark that is identical to its parent's foreign trademark. The parallel importation by a third party who buys the goods abroad (or conceivably even by the affiliated foreign manufacturer itself) creates a gray market. Two other variations on this theme occur when an American-based firm establishes abroad a manufacturing subsidiary corporation (case 2b) or its own unincorporated manufacturing division (case 2c) to produce its United States trademarked goods, and then imports them for domestic distribution. If the trademark holder or its foreign subsidiary sells the trademarked goods abroad, the parallel importation of the goods competes on the gray market with the holder's domestic sales.

In the third context (case 3), the domestic holder of a United States trademark *authorizes* an independent foreign manufacturer to use it. Usually the holder sells to the foreign manufacturer an exclusive right to use the trademark in a particular foreign location, but conditions the right on the foreign manufacturer's promise not to import its trademarked goods into the United States. Once again, if the foreign manufacturer or a third party imports into the United States, the foreign-manufactured goods will compete on the gray market with the holder's domestic goods.

B

Until 1922, the Federal Government did not regulate the importation of gray-market goods, not even to protect the investment of an independent purchaser of a foreign trademark, and not even in the extreme case where the independent foreign manufacturer breached its agreement to refrain from direct competition with the purchaser. That year, however, Congress was spurred to action by a Court of Appeals decision declining to enjoin the parallel importation of goods bearing a trademark that (as in case 1) a domestic company had purchased from an independent foreign manufacturer at a premium. See *A. Bourjois & Co.* v. *Katzel*, 275 F. 539 (CA2 1921), rev'd, 260 U. S. 689 (1923).

In an immediate response to *Katzel*, Congress enacted § 526 of the Tariff Act of 1922, 42 Stat. 975. That provision, later reenacted in identical form as § 526 of the 1930 Tariff Act, 19 U. S. C. § 1526, prohibits importing

> "into the United States any merchandise of foreign manufacture if such merchandise . . . bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and reg-

> istered in the Patent and Trademark Office by a person domiciled in the United States . . . , unless written consent of the owner of such trademark is produced at the time of making entry." 19 U. S. C. § 1526(a).[1]

The regulations implementing § 526 for the past 50 years have not applied the prohibition to all gray-market goods. The Customs Service regulation now in force provides generally that "[f]oreign-made articles bearing a trademark identical with one owned and recorded by a citizen of the United States or a corporation or association created or organized within the United States are subject to seizure and forfeiture as prohibited importations." 19 CFR § 133.21(b) (1987).[2]

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[1] The full text of § 526(a), as codified, 19 U. S. C. § 1526(a), is as follows:

"(a) Importation prohibited

"Except as provided in subsection (d) of this section [an exception added in 1978 for the importation of articles for personal use], it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States, under the provisions of sections 81 to 109 of title 15, and if a copy of the certificate of registration of such trademark is filed with the Secretary of the Treasury, in the manner provided in section 106 of said title 15, unless written consent of the owner of such trademark is produced at the time of making entry."

[2] The Customs Service regulation provides:

"§ 133.21. Restrictions on importations of articles bearing recorded trademarks and trade names.

"(a) *Copying or simulating marks or names.* Articles of foreign or domestic manufacture bearing a mark or name copying or simulating a recorded trademark or trade name shall be denied entry and are subject to forfeiture as prohibited importations. A 'copying or simulating' mark or name is an actual counterfeit of the recorded mark or name or is one which so resembles it as to be likely to cause the public to associate the copying or simulating mark with the recorded mark or name.

"(b) *Identical trademark.* Foreign-made articles bearing a trademark identical with one owned and recorded by a citizen of the United States or a

But the regulation furnishes a "common-control" exception from the ban, permitting the entry of gray-market goods manufactured abroad by the trademark owner or its affiliate:

> "(c) *Restrictions not applicable.* The restrictions . . . do not apply to imported articles when:
>
> "(1) Both the foreign and the U. S. trademark or trade name are owned by the same person or business entity; [or]
>
> "(2) The foreign and domestic trademark or trade name owners are parent and subsidiary companies or are otherwise subject to common ownership or control. . . ."

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corporation or association created or organized within the United States are subject to seizure and forfeiture as prohibited importations.

"(c) *Restrictions not applicable.* The restrictions set forth in paragraphs (a) and (b) of this section do not apply to imported articles when:

"(1) Both the foreign and the U. S. trademark or trade name are owned by the same person or business entity;

"(2) The foreign and domestic trademark or trade name owners are parent and subsidiary companies or are otherwise subject to common ownership or control (see §§ 133.2(d) [defining "common ownership and common control"] and 133.12(d) [providing that application to record trademark must report identity of any affiliate that uses same trade name abroad]);

"(3) The articles of foreign manufacture bear a recorded trademark or trade name applied under authorization of the U. S. owner;

"(4) The objectionable mark is removed or obliterated prior to importation in such a manner as to be illegible and incapable of being reconstituted, for example by:

"(i) Grinding off imprinted trademarks wherever they appear;

"(ii) Removing and disposing of plates bearing a trademark or trade name;

"(5) The merchandise is imported by the recordant of the trademark or trade name or his designate;

"(6) The recordant gives written consent to an importation of articles otherwise subject to the restrictions set forth in paragraphs (a) and (b) of this section, and such consent is furnished to appropriate Customs officials; or

"(7) The articles of foreign manufacture bear a recorded trademark and the personal exemption is claimed and allowed under § 148.55 of this chapter." 19 CFR §§ 133.21(a), (b), (c) (1987).

The Customs Service regulation further provides an "authorized-use" exception, which permits importation of gray-market goods where

> "(3) [t]he articles of foreign manufacture bear a recorded trademark or trade name applied under authorization of the U. S. owner . . . ." 19 CFR § 133.21(c) (1987).

Respondents, an association of United States trademark holders and two of its members, brought suit in Federal District Court in February 1984, seeking both a declaration that the Customs Service regulation, 19 CFR §§ 133.21(c)(1)–(3) (1987), is invalid and an injunction against its enforcement. *Coalition to Preserve the Integrity of American Trademarks* v. *United States*, 598 F. Supp. 844 (DC 1984). They asserted that the common-control and authorized-use exceptions are inconsistent with § 526 of the 1930 Tariff Act.[3] Petitioners K mart and 47th Street Photo intervened as defendants.

The District Court upheld the Customs Service regulation, 598 F. Supp., at 853, but the Court of Appeals reversed, *Coalition to Preserve the Integrity of American Trademarks* v. *United States*, 252 U. S. App. D. C. 342, 790 F. 2d 903 (1986) (hereinafter *COPIAT*), holding that the Customs Service regulation was an unreasonable administrative interpretation of § 526. We granted certiorari, 479 U. S. 1005 (1986), to resolve a conflict among the Courts of Appeals. Compare *Vivitar Corp.* v. *United States*, 761 F. 2d 1552, 1557–1560 (CA Fed. 1985), aff'g 593 F. Supp. 420 (Ct. Int'l Trade 1984), cert. denied, 474 U. S. 1055 (1986); and *Olympus Corp.* v. *United States*, 792 F. 2d 315, 317–319 (CA2 1986), aff'g 627 F.

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[3] Respondents sued the United States, the Secretary of the Treasury, and the Commissioner of Customs. They also asserted that the Customs Service regulation was inconsistent with § 42 of the Lanham Trade-Mark Act, 15 U. S. C. § 1124, which prohibits the importation of goods bearing marks that "copy or simulate" United States trademarks. That issue is not before us.

Supp. 911 (EDNY 1985), cert. pending, No. 86–757, with *COPIAT*, *supra*, at 346–355, 790 F. 2d, at 907–916. In an earlier opinion, we affirmed the Court of Appeals' conclusion that the District Court had jurisdiction, and set the cases for reargument on the merits. 485 U. S. 176 (1988).

A majority of this Court now holds that the common-control exception of the Customs Service regulation, 19 CFR §§133.21(c)(1)–(2) (1987), is consistent with §526. See *post*, at 309–310 (opinion of BRENNAN, J.). A different majority, however, holds that the authorized-use exception, 19 CFR §133.21(c)(3) (1987), is inconsistent with §526. See *post*, at 328–329 (opinion of SCALIA, J.). We therefore affirm the Court of Appeals in part and reverse in part.

II

A

In determining whether a challenged regulation is valid, a reviewing court must first determine if the regulation is consistent with the language of the statute. "If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' . . . The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Board of Governors, FRS* v. *Dimension Financial Corp.*, 474 U. S. 361, 368 (1986), quoting *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). See also *Mills Music, Inc.* v. *Snyder*, 469 U. S. 153, 164 (1985). In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole. *Bethesda Hospital Assn.* v. *Bowen*, 485 U. S. 399, 403–405 (1988); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U. S. 207, 220–221 (1986). If the statute is silent or ambiguous with respect to the specific issue addressed by the regulation, the question becomes whether the agency regulation is a permissible construction of the statute. See *Chevron, supra,* at 843; *Chemical Manufacturers Assn.* v. *Natural Resources Defense Council, Inc.,* 470 U. S. 116, 125 (1985). If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute. *United States* v. *Boyle,* 469 U. S. 241, 246, n. 4 (1985).

B

Following this analysis, I conclude that subsections (c)(1) and (c)(2) of the Customs Service regulation, 19 CFR §§ 133.21 (c)(1) and (c)(2) (1987), are permissible constructions designed to resolve statutory ambiguities. All Members of the Court are in agreement that the agency may interpret the statute to bar importation of gray-market goods in what we have denoted case 1 and to permit the imports under case 2a. See *post,* at 296, 298–299 (opinion of BRENNAN, J.); *post,* at 318 (opinion of SCALIA, J.). As these writings state, "owned by" is sufficiently ambiguous, in the context of the statute, that it applies to situations involving a foreign parent, which is case 2a. This ambiguity arises from the inability to discern, from the statutory language, which of the two entities involved in case 2a can be said to "own" the United States trademark if, as in some instances, the domestic subsidiary is wholly owned by its foreign parent.

A further statutory ambiguity contained in the phrase "merchandise of foreign manufacture," suffices to sustain the regulations as they apply to cases 2b and 2c. This ambiguity parallels that of "owned by," which sustained case 2a, because it is possible to interpret "merchandise of foreign manufacture" to mean (1) goods manufactured in a foreign country, (2) goods manufactured by a foreign company, or (3) goods manufactured in a foreign country by a foreign company. Given the imprecision in the statute, the agency is entitled to choose any reasonable definition and to interpret the statute to say that goods manufactured by a foreign subsidiary or division of a domestic company are not goods "of foreign manufacture."[4]

C

(1)

Subsection (c)(3), 19 CFR § 133.21(c)(3) (1987), of the regulation, however, cannot stand. The ambiguous statutory phrases that we have already discussed, "owned by" and

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[4] I disagree with JUSTICE SCALIA's reasons for declining to recognize this ambiguity. See *post*, at 319–323. First, the threshold question in ascertaining the correct interpretation of a statute is whether the language of the statute is clear or arguably ambiguous. The purported gloss any party gives to the statute, or any reference to legislative history, is in the first instance irrelevant. Further, I decline to assign any binding or authoritative effect to the particular verbiage JUSTICE SCALIA highlights. The quoted phrases are simply the Government's explanation of the practical effect the current regulation has in applying the statute, and come from the statement-of-the-case portion of its petition for a writ of certiorari.

Additionally, I believe that agency regulations may give a varying interpretation of the same phrase when that phrase appears in different statutes and different statutory contexts. There may well be variances in purpose or circumstance that have led the agency to adopt and apply dissimilar interpretations of the phrase "of foreign manufacture" in other regulations implementing different statutes.

I also disagree that our disposition necessarily will engender either enforcement problems for the Customs Service or problems we are unaware of arising out of our commercial treaty commitments to foreign countries. Initially, it is reasonable to think that any such problems or objections would have arisen before now since it is the current interpretation of the regulations we are sustaining. Second, I believe that the regulation speaks to the hypothetical situation JUSTICE SCALIA poses, and that the firm with the United States trademark could keep out "gray-market imports manufactured abroad by the other American firms," *post*, at 320, because the regulation allows a company justifiably invoking the protection of the statute to bar the importation of goods of foreign or domestic manufacture. 19 CFR § 133.21(a) (1987). In this instance, the domestic firm with the United States trademark could invoke the protection of the statute (case 1) and bar the importation of the other domestic firm's product manufactured abroad even though our interpretation of the phrase "of foreign manufacture" would characterize these latter goods to be of domestic manufacture.

"merchandise of foreign manufacture," are irrelevant to the proscription contained in subsection (3) of the regulation. This subsection of the regulation denies a domestic trademark holder the power to prohibit the importation of goods made by an independent foreign manufacturer where the domestic trademark holder has authorized the foreign manufacturer to use the trademark. Under no reasonable construction of the statutory language can goods made in a foreign country by an independent foreign manufacturer be removed from the purview of the statute.

(2)

The design of the regulation is such that the subsection of the regulation dealing with case 3, § 133.21(c)(3), is severable. Cf. *Board of Governors, FRS* v. *Dimension Financial Corp.*, 474 U. S., at 368 (invalidating a Federal Reserve Board definition of "bank" in 12 CFR § 225.2(a)(1) (1985), but leaving intact the remaining parts of the regulation). The severance and invalidation of this subsection will not impair the function of the statute as a whole, and there is no indication that the regulation would not have been passed but for its inclusion. Accordingly, subsection (c)(3) of § 133.21 must be invalidated for its conflict with the unequivocal language of the statute.

III

We hold that the Customs Service regulation is consistent with § 526 insofar as it exempts from the importation ban goods that are manufactured abroad by the "same person" who holds the United States trademark, 19 CFR § 133.21(c)(1) (1987), or by a person who is "subject to common . . . control" with the United States trademark holder, § 133.21(c)(2). Because the authorized-use exception of the regulation, § 133.21(c)(3), is in conflict with the plain language of the statute, that provision cannot stand. The judgment of the

Court of Appeals is therefore reversed insofar as it invalidated §§ 133.21(c)(1) and (c)(2), but affirmed with respect to § 133.21(c)(3).

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, and with whom JUSTICE WHITE joins as to Part IV, concurring in part and dissenting in part.

Section 526 of the Tariff Act of 1930 (1930 Tariff Act), 46 Stat. 741, as amended, 19 U. S. C. § 1526, provides extraordinary protection to certain holders of trademarks registered in the United States. A United States trademark holder covered by § 526 can prohibit or condition all importation of merchandise bearing its trademark, thereby gaining a virtual monopoly, free from intrabrand competition, on domestic distribution of any merchandise bearing the trademark. For half a century the Secretary of the Treasury has consistently interpreted § 526 to grant this exclusionary power not to all United States trademark holders, but only to certain ones with specifically defined relationships to the manufacturer. Specifically, Treasury has a longstanding practice, expressed currently in 19 CFR § 133.21 (1987) (Customs Service regulation), of not extending § 526's extraordinary protection to the very firm that manufactured the gray-market merchandise abroad, to affiliates of foreign manufacturers, or to firms that authorize the use of their trademarks abroad. Consequently, a multibillion dollar industry has emerged around the parallel importation of foreign-manufactured merchandise bearing United States trademarks.

In the face of this longstanding interpretation of § 526's reach, respondent Coalition to Preserve the Integrity of American Trademarks and its members, most of whom are United States trademark holders or affiliates of United States trademark holders that compete against the gray market, have waged a full-scale battle in legislative, executive, and administrative fora against the Customs Service regulation, and particularly the common-control exception, 19 CFR §§ 133.21(c)(1) and (c)(2) (1987). See Eisler, Gray-Market Mayhem: It's Makers vs. Importers in Lobbying Onslaught, Legal Times, Nov. 17, 1986, p. 1, col. 1. Largely unsuccessful in the political branches, they have more recently brought the battle to the courts, asserting that Treasury is (and, since 1922, has been) statutorily required to extend to them the same exclusionary powers as it extends to what the Court refers to as the "prototypical gray-market victim." *Ante*, at 286.[1] This is such a suit.

There is no dispute that § 526 protects the trademark holder in the first of the three gray-market contexts identified by the Court—the prototypical gray-market situation in which a domestic firm purchases from an independent foreign firm the rights to register and use in the United States a foreign trademark (case 1). See *ante*, at 292. The dispute in this litigation centers almost exclusively around the second context, involving a foreign manufacturer that is in some way affiliated with the United States trademark holder, whether the trademark holder is a subsidiary of (case 2a), the parent of (case 2b), or the same as (case 2c), the foreign manufacturer. The Customs Service's common-control exception denudes the trademark holder of § 526's protection in each of the foregoing cases. I concur in the Court's judgment that the common-control exception is consistent with § 526, but I reach that conclusion through an analysis that differs from JUSTICE KENNEDY's. See *ante*, at 292–293.

Also at issue, although the parties and *amici* give it short shrift, is the third context (case 3), in which the domestic firm authorizes an independent foreign manufacturer to use its trademark abroad. See *ante*, at 287, 293–294. The Customs Service's authorized-use exception, 19 CFR § 133.21(c)(3) (1987), deprives the trademark holder of § 526's protection in such a situation. For reasons set forth in Part IV of this opinion, I dissent from the Court's judgment that the authorized-use exception is inconsistent with § 526.

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[1] See, *e. g.*, *Olympus Corp.* v. *United States*, 792 F. 2d 315 (CA2 1986), aff'g 627 F. Supp. 911 (EDNY 1985), cert. pending, No. 86–757; *Vivitar Corp.* v. *United States*, 761 F. 2d 1552 (CA Fed. 1985), aff'g 593 F. Supp. 420 (Ct. Int'l Trade 1984), cert. denied, 474 U. S. 1055 (1986); *Lever Brothers Co.* v. *United States*, 652 F. Supp. 403 (DC 1987).

I

A

An assessment of the reasonableness of the Customs Service's interpretation of § 526 of the 1930 Tariff Act begins, as always, with an assessment of "the particular statutory language at issue, as well as the language and design of the statute as a whole." *Ante*, at 291 (citations omitted). Section 526 requires consent of the trademark owner to import a United States trademarked product if (1) the product is "of foreign manufacture"; (2) the trademark it bears is "owned by" either a United States citizen or "a corporation . . . created or organized within . . . the United States"; and (3) "a person domiciled in the United States" registered the trademark.

The most blatant hint that Congress did not intend to extend § 526's protection to affiliates of foreign manufacturers (case 2) is the provision's protectionist, almost jingoist, flavor. Its structure bespeaks an intent, characteristic of the times, to protect only domestic interests. A foreign manufacturer that imports its trademarked products into the United States cannot invoke § 526 to prevent third parties from competing in the domestic market by buying the trademarked goods abroad and importing them here: The trademark is not "registered in the Patent and Trademark Office." The same manufacturer cannot protect itself against parallel importation merely by registering its trademark in the United States: It is not "a person domiciled in the United States." Nor can the manufacturer insulate itself by hiring a United States domiciliary to register the trademark: The owner is not "organized within . . . the United States." For the same reason, it will not even suffice for the foreign manufacturer to incorporate a subsidiary here to register the trademark on the parent's behalf, if the foreign parent still owns the trademark.

The barriers that Congress erected seem calculated to serve no purpose other than to reserve exclusively to domestic, not foreign, interests the extraordinary protection that § 526 provides. But they are fragile barriers indeed if a foreign manufacturer might bypass them by the simple device of incorporating a shell domestic subsidiary and transferring to it a single asset—the United States trademark. Such a reading of § 526 seems entirely at odds with the protectionist sentiment that inspired the provision. If a foreign manufacturer could insulate itself so easily from the competition of parallel imports, much of § 526's limiting language would be pointless.

B

The language of § 526 can reasonably be read, as the Customs Service has, to avoid such an anomaly. Section 526 defines neither "owned by" nor "of foreign manufacture," and both phrases admit of considerable ambiguity when applied to affiliates of foreign manufacturers. More specifically, in each of the disputed gray-market cases involving a domestic affiliate of a foreign manufacturer (case 2), it cannot be confidently discerned either which entity owns the trademark or whether the goods in question are "of foreign manufacture."

As every Member of this Court agrees, § 526 does not unambiguously cover the situation in which a domestic subsidiary of a foreign manufacturer registers its parent's trademark in the United States (case 2a), because the trademark is not clearly "owned by" a domestic firm. See *ante*, at 292; *post*, at 318 (opinion of SCALIA, J.). "The term ['owner'] is . . . nomen generalissimum, and its meaning is to be gathered from the connection in which it is used, and from the subject-matter to which it is applied." Black's Law Dictionary 996 (5th ed. 1979). But whether "ownership" is the "[c]ollection of rights to use and enjoy property, including [the] right to transmit it to others," or "[t]he complete dominion, title, or proprietary right in a thing," or "[t]he entirety of the powers of use and disposal allowed by law," *id.*, at 997, the parent corporation—not the subsidiary whose every decision it controls—better fits the bill as the true owner of any property that the subsidiary nominally possesses. Cf. *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 771 (1984) (parent and wholly owned subsidiary cannot engage in "conspiracy" within meaning of § 1 of the Sherman Act, 15 U. S. C. § 1, because they "*always* have a 'unity of purpose or a common design'") (citation omitted) (emphasis in original). Because of this ambiguity "[t]he Patent and Trademark Office takes the position that ownership of marks among parent-subsidiary corporations . . . is largely a matter to be decided between the parties themselves." 1 J. McCarthy, Trademarks and Unfair Competition 748 (2d ed., 1984) (footnote omitted).

The same ambiguity does not, of course, infect cases 2b and 2c. A domestic parent plainly owns the trademark registered in its name, whether or not it also owns a manufacturing subsidiary (case 2b) or division (case 2c) abroad. Nevertheless, § 526 does not unambiguously cover cases 2b and 2c because it is unclear whether merchandise manufactured abroad by a division or a subsidiary of a domestic firm is "merchandise of foreign manufacture." That phrase could readily be interpreted to mean either "merchandise manufactured in a *foreign country*" or "merchandise manufactured by a *foreigner*." Under the former definition, the merchandise manufactured abroad in cases 2b and 2c would fall within § 526's ban. Under the latter definition, however, the coverage is not as clear. Surely a domestic firm that establishes a manufacturing facility abroad (case 2c) is not in any sense a foreigner, and it is at the very least reasonable to view as "American" the foreign subsidiary of a domestic firm.

II

Even if the language of § 526 clearly covered all affiliates of foreign manufacturers, "[i]t is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'"[2] It is therefore appropriate to turn to our other "traditional tools of statutory construction" for clues of congressional intent. *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 446 (1987). The purpose and legislative history of § 526 confirm that if Congress had any intent as to the application of § 526 to affiliates of foreign manufacturers, it was that they ought not enjoy § 526's protection. There is, admittedly, evidence suggesting that some legislators might have understood § 526 otherwise. That evidence, however, is slim, ambiguous, and interspersed among more—and more convincing—evidence that Congress had a contrary intent.

A

Section 526 can be fully understood only in the context of the controversial judicial opinion that spawned it. In *A. Bourjois & Co.* v. *Katzel*, 275 F. 539 (CA2 1921), rev'd, 260 U. S. 689 (1923), a French producer of "Java" face powder sold to an independent United States company at a considerable premium all its United States business, along with its goodwill and full rights in its United States trademarks. The United States company, Bourjois & Co., registered the newly acquired trademarks under its own name and continued to import the powder from the French producer, selling it to domestic consumers under the French trademark and its own name. All the while, the United States company went to great expense to develop an identity independent from that of the French producer of its product. But much of the expense went to waste, for a competitor began to buy Java directly from the French producer abroad and market it here under the French trademark in competition with Bourjois. In sum, Bourjois was a "prototypical gray-market victim"—a United States trademark holder that purchased its trademark rights, at arm's length and at substantial cost, from an unaffiliated foreign producer. *Ante*, at 286.

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[2] *Steelworkers* v. *Weber*, 443 U. S. 193, 201 (1979) (quoting *Holy Trinity Church* v. *United States*, 143 U. S. 457, 459 (1892)). See also *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 432, n. 12 (1987) (citing cases); *Kelly* v. *Robinson*, 479 U. S. 36, 43–44 (1986); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U. S. 207, 220–221 (1986).

Despite the apparent unfairness of the competition, the Court of Appeals for the Second Circuit declined to enjoin the encroachment on the trademark holder's newly purchased market. The court could find no trademark violation so long as the competitor's French labels accurately identified the product's manufacturer. It adhered to the then-prevailing "universality" theory of trademark law, a view that it had espoused for several years. See, *e. g.*, *Fred Gretsch Mfg. Co.* v. *Schoening*, 238 F. 780, 782 (1916). Under that view, trademarks do not confer on the owner property interests or monopoly power over intrabrand competition. Rather, they merely protect the public from deception by indicating "the origin of the goods they mark." *Katzel*, *supra*, at 543.

While Bourjois, the prototypical (case 1) gray-market victim, evoked little sympathy from the Court of Appeals, it would have been a far less sympathetic plaintiff had it not bargained and paid so dearly for the Java trademark and distribution rights. And the gray-market encroachment on the Java market would have been considerably less troubling had Bourjois had control over the foreign manufacturer's import conduct or over its sales abroad to third parties who might import; it would essentially have been seeking to protect itself from its own competition.

A comparison of Bourjois to the parties seeking § 526's protection in this litigation aptly illustrates the profound difference between the equities presented by the prototypical gray-market victim and those implicated in case 2. First, the United States trademark holder that, like Bourjois, has purchased trademark rights at arm's length from an independent manufacturer stands to lose the full benefit of its bargain because of gray-market interference. In contrast, a United States trademark holder that acquires identical rights from an affiliate (case 2a) or creates identical rights itself and permits them to be used abroad by an affiliate (cases 2b and 2c) does not have the same sort of investment at stake.

Second, without § 526, the independent trademark purchaser has no direct control over the importation of competing goods, much less over the manufacturer's sale to third parties abroad. In contrast, if the gray market harms a United States trademark holder in case 2a, 2b, or 2c, that firm and its foreign affiliate (whether a parent, subsidiary, or division) can respond with a panoply of options that are unavailable to the independent purchaser of a foreign trademark. They could, for example, jointly decide in their mutual best interests that the manufacturer (1) should not import directly to any domestic purchaser other than its affiliate; (2) should, if legal, impose a restriction against resale (or against resale in the United States) as a condition on its sales abroad to potential parallel importers; or (3) should curtail sales abroad entirely.

These differences furnish perfectly rational reasons that Congress might have intended to distinguish between a domestic firm that purchases trademark rights from an independent foreign firm and one that either acquires identical rights from an affiliated foreign firm or develops identical rights and permits a manufacturing subsidiary or division to use them abroad.

B

There is no dispute that the perceived inequity in case 1, as exemplified by *Katzel*, was the "major stimulus" for the enactment of § 526. *Coalition to Preserve the Integrity of American Trademarks* v. *United States*, 252 U. S. App. D. C. 342, 348, 790 F. 2d 903, 909 (1986) (hereafter *COPIAT*); see also

Sturges v. *Clark D. Pease, Inc.*, 48 F. 2d 1035, 1037 (CA2 1931) (A. Hand, J.); *Coty, Inc.* v. *Le Blume Import Co.*, 292 F. 264, 268–269 (SDNY 1923) (L. Hand, J.). United States trademark holders, many of which had purchased foreign trademarks from unrelated foreign corporations, demanded an immediate legislative response to *Katzel*. Congress responded with § 526 of the 1922 Tariff Act, without even waiting for this Court to reverse the Second Circuit (which it ultimately did three months later). The hastily drafted provision was introduced as a "midnight amendmen[t]" on the floor of the Senate, 62 Cong. Rec. 11602 (1922) (remarks of Sen. Moses), and allotted a miserly 10 minutes of debate, in the context of a debate on a comprehensive revision of tariff (not trademark) law. The specific wording of the response was by no means carefully considered, which provides all the more reason to avoid a hypertechnical interpretation that would "make trouble rather than allay it." *Fort Smith & Western R. Co.* v. *Mills*, 253 U. S. 206, 208 (1920); see *United States* v. *Bass*, 404 U. S. 336, 344 (1971).

The language that was originally introduced prohibited in essence the importation, without the trademark owner's consent, of "any merchandise if such merchandise . . . bears a trade-mark registered in the Patent Office by a person domiciled in the United States." 62 Cong. Rec. 11602 (1922). As initially drafted, § 526 lacked two of its three current limitations. See *supra*, at 297. First, it did not limit the import prohibition to goods that were "of foreign manufacture"; that limitation was added later by floor amendment when an opponent pointed out that the provision as written would preclude, for example, a United States citizen from importing a domestically manufactured product that had been exported to, and then purchased by him in, Canada. Second, the bill lacked the requirement that the trademark be "owned by a citizen of, or by a corporation or association created or organized within, the United States"; that limitation appeared for the first time, without explanation, in the Conference

Report. H. R. Conf. Rep. No. 1223, 67th Cong., 2d Sess. (1922). See *infra*, at 306–307.

The sparse legislative history confirms that Congress' sole goal was to overrule *Katzel*. Section 526's sponsors and proponents categorically rejected any suggestion that its effect might be broader than necessary to overrule *Katzel* on its facts. They emphasized repeatedly that § 526 would serve at the very most to protect domestic companies who (like Bourjois) purchased trademark rights from unrelated foreign manufacturers.[3] In fact, the first Senator to object to § 526 was troubled by the impropriety of enacting a provision designed to do no more than reverse *Katzel* while it was still pending before this Court, 62 Cong. Rec. 11603 (1922) ("[T]he *whole subject matter* involved in [§ 526] . . . has been heard in the circuit court of appeals [in *Katzel*] and is now on its way to the Supreme Court of the United States for final determination") (remarks of Sen. Moses), a characterization with which no one took issue.

If anything, the most outspoken supporters of § 526 characterized it as even more limited than *Katzel* for they seemed to have been operating under the mistaken impression that the French producer in *Katzel* was itself importing Java in competition with Bourjois and in violation of its agreement. Thus, several proponents, like Senator Sutherland, repeatedly described the "only aim" of § 526 as the "prevent[ion] [of] a palpable fraud," 62 Cong. Rec. 11603 (1922), or the protection of domestic firms that purchase trademarks from foreign manufacturers, which then "deliberately violate the property rights of those to whom they have sold these trade-marks by shipping over to this country goods under those identical trade-marks." *Ibid.*[4]

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[3] See 62 Cong. Rec. 11604 (1922) (bill's cosponsor, Sen. McCumber, complains that after *Katzel*, "the American *purchasers* of these [trademark] rights are entirely unprotected") (emphasis added); *ibid.* (purpose "is to give the opportunity to protect the American *purchaser*") (emphasis added) (remarks of Sen. McCumber); *ibid.* (Sen. Simmons describes case of domestic purchasers of Bayer Aspirin trademark from German company, whose investment § 526 would protect by precluding importation of aspirin by third party under same trademark).

The Court of Appeals read an exchange between Senators Lenroot and McCumber to suggest that § 526 could have been understood to go further than necessary merely to overrule *Katzel* on its facts.[5] The exchange began with Senator

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[4] See also *id.*, at 11604 (describing § 526 as "a prohibition against the violation of . . . contract"; "In a thousand ways we have guarded against fraud, and this [is] one among the thousand") (remarks of Sen. McCumber).

It is conceivable, as the Court of Appeals suggested, that the quoted statements were merely "efforts by proponents of a bill to understate its significance," *COPIAT*, 252 U. S. App. D. C. 342, 350, 790 F. 2d 903, 911 (1986). But without firmer evidence tending to impugn a legislator's integrity, the presumption that legislators mean what they say would seem more appropriate than the opposite presumption that the Court of Appeals applied. At any rate, if a sponsor of legislation needs to understate the significance of a provision in order to secure its passage, it is reasonable to assume that other legislators relied on the sponsor's statements in casting their votes.

[5] The Court of Appeals also made much of a question posed by Senator Lenroot, which prompted an amendment of § 526 on the Senate floor. Senator Lenroot objected that under § 526, as originally drafted, a United States citizen who purchased an American product while in Canada could not carry the product across the United States border. In recognition of the absurdity of that result, Senator McCumber offered, and the Senate adopted, an amendment limiting the prohibition to goods "of foreign manufacture." 62 Cong. Rec. 11603–11604 (1922). The Court of Appeals thought it significant that Senator McCumber felt compelled to amend the provision rather than "simply noting (as the Customs Service would under its regulations) that the owners of the American and Canadian trademarks were the same company, or that the American trademark owner had authorized the use of the trademark." *COPIAT*, *supra*, at 350, 790 F. 2d, at 911. Senator McCumber's response is not as telling as the Court of Appeals suggests. In the first place, it is not at all clear that there was a Canadian trademark in Senator Lenroot's illustration. Second, even if such an assumption were implicit, a legislator's choice of one solution does not prove that he considered others nonviable. Third, the hypothetical demonstrated one respect in which the hastily drafted provision was not narrowly tailored to *Katzel*'s facts. Senator McCumber's prompt floor amendment is just as consistent with a motive to tailor the provision more to *Katzel*'s specific facts as it is with a suggestion that § 526 was never in-

Lenroot's inquiry whether § 526 would protect from parallel imports a foreign manufacturer whose "American *agents* . . . *register* a trade-mark . . . here in the United States," 62 Cong. Rec. at 11605 (emphasis added), to which Senator McCumber gave the following opaque response:

> "[I]f there has been no transfer of trade-mark, that presents an entirely different question. But suppose the trade-mark is owned exclusively by an American firm or corporation. The mere fact of a foreigner having a trade-mark and registering that trade-mark in the United States, and selling the goods in the United States through an *agency*, of course, would not be affected by this provision." *Ibid.* (emphasis added).

Dissatisfied with the response, Senator Lenroot rephrased the question: whether the foreign owner of "an international trade-mark . . . , *registered* by an American, with American *domicile*" could preclude parallel importation of the product "without the written consent of the [foreign firm], or their *agent domiciled* here in America." *Ibid.* (emphasis added). Time ran out before Senator McCumber could answer.

I disagree with both the inference that the Court of Appeals drew from Senator Lenroot's question and its reading of the answer. In the first place, the question, in either formulation, does not suggest that "Senator Lenroot . . . was concerned that foreign corporations could obtain the statutory monopoly simply by *incorporating* an American *subsidiary*." *COPIAT*, 252 U. S. App. D. C., at 350, 790 F. 2d, at 911 (emphasis added). It refers only to the possibility of a foreign company "hav[ing] an agent" (not necessarily "incorporating a subsidiary") in the United States to "register" (not necessarily to "own") the foreign trademark. The question

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tended to be so limited in the first place. Indeed, the Senators' concern that domestic companies not be shielded from importation of their own goods suggests a desire not to extend § 526's protection to domestic companies from the parallel imports disputed in this litigation over which they have control.

seems to have been directed to the inadvertent omission, subsequently remedied by the Conference Committee, of the requirement that the trademark be "owned by a citizen of, or by a corporation . . . created . . . within the United States."

Secondly, even if I could accept the conclusion that Senator Lenroot initially read § 526 as permitting a foreign firm to invoke § 526 merely through the artifice of creating a subsidiary, Senator McCumber's response laid to rest any such fear. He reiterated what had been said repeatedly: Section 526 would apply only to a situation in which there has been a "transfer"—presumably at arm's length—of the trademark; and only where the trademark "is owned exclusively—by an American"—presumably an exclusively American—firm. Thus, even if both Senators meant "subsidiary" when they used the word "agent," Senator McCumber's answer squarely negated any suggestion that § 526 would apply; such a situation, "of course, would not be affected by this provision."

C

The sliver of legislative history on which the Court of Appeals relied most heavily in support of its reading of § 526 was the following statement in the Conference Report:

> "A recent decision of the circuit court of appeals holds that existing law does not prevent the importation of merchandise bearing the same trade-mark as merchandise of the United States, if the imported merchandise is genuine and if there is no fraud upon the public. [Section 526] makes such importation unlawful without the consent of the owner of the American trade-mark, in order to protect the American manufacturer or producer. . . ." H. R. Conf. Rep. No. 1223, 67th Cong., 2d Sess., at 158.

The Court of Appeals read the statement that § 526 "makes *such* importation unlawful" as meaning that § 526 would prevent the importation of *any* merchandise bearing a United

States trademark, so long as the imported merchandise is genuine and there is no fraud on the public, even though the holder of the United States trademark is affiliated with the manufacturer. That is, concededly, a plausible reading of that brief passage. But cf. Atwood, Import Restrictions on Trademarked Merchandise—The Role of the United States Bureau of Customs, 59 Trademark Rep. 301, 304 (1969) (describing Conference Report as "evidence of the misunderstanding of the facts of the Katzel case"). More plausible, though, is that the first sentence quoted above merely described the well-established legal theory that compelled the result in *Katzel*, and the second sentence, declaring the unlawfulness of "such importation" referred to the type of importation at issue in *Katzel—i. e.*, parallel importation of goods bearing a United States trademark *purchased* by an *independent* domestic company from a foreign manufacturer. Only if the second sentence were so limited would § 526 "protect the American manufacturer or producer," as the Conference Report itself says it does, for (as this case aptly demonstrates) the alternative would constitute Government-enforced insulation of the United States markets of foreign corporations.

As the Court of Appeals had to concede, *COPIAT*, *supra*, at 349, 790 F. 2d, at 910, its own reading imputed to Congress an intent to effect a sweeping transformation of the then-prevailing trademark doctrine. Congress, the argument goes, intended to reject squarely the Second Circuit's "universality theory" that a trademark was a device to protect the public against fraud by properly identifying the product's manufacturer, not a device to protect the trademark owner against competing sales of its own goods. See *supra*, at 301. When Congress intends to effect so radical a departure from prevailing legal doctrine, it ordinarily acknowledges as much and does so in more than a single cryptic comment in a conference report. Moreover, Congress typically would not sneak such a sweeping doctrinal change into a massive legislative overhaul on an unrelated topic (here tariff revision). And it usually would (though did not here) refer the matter to the committee with expertise in the area. See 62 Cong. Rec. 11602 (1922) (remarks of Sen. Moses). Since Congress did not so much as hint that it was engaged in such an ambitious task, the more plausible reading of the cryptic Conference Report is that Congress intended merely to remedy a specific inequity that the prevailing doctrine produced, not to abolish the entire doctrine that produced it.[6]

In sum, the legislative history and purpose of § 526 confirm, and JUSTICE SCALIA does not dispute, that if Congress had any particular intent with respect to the application of § 526 to trademark owners affiliated with foreign manufacturers, it was to exclude them from its shield. At the very least, that interpretation—which forms the basis of the Customs Service regulation—is reasonable. See *Cardoza-Fonseca*, 480 U. S., at 445–449.

III

The conclusion that the common-control exception is consistent with § 526 is further buttressed by the deference owed to an agency interpretation that represents a longstanding agency position. See *Zenith Radio Corp.* v. *United States*,

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[6] If the congressional debates surrounding the initial enactment of § 526 were less than clear, the reenactment of § 526 in the 1930 Tariff Act was utterly confused. One proposal, which Congress ultimately rejected, was to substitute for § 526 a new and substantially different provision. See 71 Cong. Rec. 3871–3876, 3889–3906 (1929). The only two Senators who discussed § 526's current meaning mischaracterized it as a provision designed to protect United States trademark owners from infringement of their trademarks, rather than from the competition of valid trademarks. See *id.*, at 3837 (remarks of Sen. Reed); *id.*, at 3872 (remarks of Sen. George). The debates certainly do not evince the level of understanding that one might expect of a Legislature that only eight years earlier is said to have effected through that provision a sweeping doctrinal revision. Significantly, in discussing the reenactment of § 526, no one suggested that it was no longer limited to the facts of *Katzel*, as the Congress that originally enacted it intended.

437 U. S. 443, 450 (1978); *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 275 (1974). While the precise language of the importation bar has varied over the years, Treasury has for 50 years adhered to the basic premise of the common-control exception—that § 526 does not require exclusion of all gray-market goods.

Until 1936, Treasury's regulations merely tracked the language of § 526, see Cust. Reg. 1923, art. 476; Cust. Reg. 1931, arts. 517(*a*), 518, but respondents point to no evidence that the Customs Service had any practice of excluding goods bearing trademarks registered by affiliates of foreign corporations. That year Treasury explicitly adopted for the first time a "same-company" exception, which barred foreign manufactured goods bearing United States trademarks except if the foreign and domestic trademarks "are owned by the same person, partnership, association, or corporation." See T. D. 48537, 70 Treas. Dec. 336–337 (1936) (amending art. 518(b)). Contrary to the assertion of the Court of Appeals, *COPIAT*, 252 U. S. App. D. C., at 353, and n. 14, 790 F. 2d, at 914, and n. 14, Treasury's preamble specifically invoked its authority under §§ 526 and 624 of the 1930 Tariff Act (as well as § 27 of the Trade-Mark Act of 1905) in introducing the same-company exception. Treasury adhered to an identical same-company formulation of the exception upon reissuing the regulation in 1937, see Cust. Reg. 1937, arts. 536(*a*), 537; in 1943, see 19 CFR § 11.14(b) (1943); and in 1947, see 19 CFR § 11.14(b) (1947), each time citing specifically § 526 as partial authority for the interpretation. For 17 years thereafter, the regulation remained unchanged, and the Customs Service permitted parallel importation so long as the manufacturer and the United States trademark holder were affiliated, including situations where the holder was the manufacturer's subsidiary. See *In re Georg Jensen Inc.*, T. D. 52711, 86 Treas. Dec. 92 (1951); Derenberg, The Impact of the Antitrust Laws on Trade-Marks in Foreign Commerce, 27 N. Y. U. L. Rev. 414, 429 (1952).

In 1953, Treasury revised its regulations "[t]o eliminate obsolete material [and] correct discrepancies," T. D. 53399, 88 Treas. Dec. 376, that arose as international corporate relationships grew in complexity. It adhered to the same-company exception but enlarged it to encompass the situation in which the foreign manufacturer is a "related company as defined in section 45 of the [Lanham Trade-Mark] Act, [15 U. S. C. § 1127 (1982 ed. and Supp. IV)]," one that "legitimately controls, or is controlled by" the domestic trademark owner "in respect to the nature and quality of the goods in connection with which the mark is used." T. D. 53399, 88 Treas. Dec., at 384. Although the new regulations, for the first time, omitted reference to § 526, contemporaneous commentators uniformly recognized that the omission was inadvertent. See, *e. g.*, Derenberg, The Seventh Year of Administration of the Lanham Trade-Mark Act of 1946, 44 Trade-Mark Rep. 991, 996–1000 (1954); Note, Trade-Mark Infringement: The Power of an American Trade-Mark Owner to Prevent the Importation of the Authentic Product Manufactured by a Foreign Company, 64 Yale L. J. 557, 559–562, 566–568 (1955). It would have been nonsensical in the extreme for Treasury to announce that goods excludable in any event under § 526 are not barred by the Lanham Trade-Mark Act.

That exception remained in place until 1959, when (for reasons not relevant here) Treasury deleted the related-company formulation of the exception and returned to the same-company formulation. Significantly, however, Treasury and the Customs Service continued to apply the provision as if the related-company language had still been there, permitting importation of gray-market goods where "the foreign producer is the parent or subsidiary of the American [trademark] owner or the firms are under a common control." T. D. 69–12(2), 3 Cust. Bull. 17 (1969); see also Letter from Deputy Customs Commissioner Flinn to Felix Levitan (Mar. 15, 1963), App. 63 (articulating Customs Service's "position for many years" that § 526 is inapplicable where "merchandise [is] manufactured or sold by the foreign parent or subsidiary corporation of an American trademark owner").

In 1972, Treasury promulgated the current Customs Service regulation, with its common-control exception once more codifying the practice that the Customs Service has adhered to for 50 years. In sum, the agency has (to quote the Customs Service's long-time attorney) "always denied complete exclusionary protection to an American trademark registrant when it knew the importer to be a subsidiary or parent of the foreign user of the trademark." Atwood, 59 Trademark Rep., at 305–307. We do not lightly overturn administrative practices as longstanding as the ones challenged in this action. This is particularly true where, as here, an immense domestic retail industry has developed in reliance on that consistent interpretation. *Zenith Radio Corp.* v. *United States*, 437 U. S., at 457.

IV

I turn now to my small area of disagreement with the Court's judgment—the Court's conclusion that the authorized-use exception embodied in 19 CFR § 133.21(c)(3) (1987) is inconsistent with the plain language of § 526. In my view, § 526 does not unambiguously protect from gray-market competition a United States trademark owner who authorizes the use of its trademark abroad by an independent manufacturer (case 3).

Unlike the variations of corporate affiliation in case 2, see *supra*, at 299, the ambiguity in § 526, admittedly, is not immediately apparent in case 3. In that situation, the casual reader of the statute might suppose that the domestic firm still "own[s]" its trademark. Any such supposition as to the meaning of "owned by," however, bespeaks stolid anachronism not solid analysis. It follows only from an understanding of trademark law that established itself long after the 1922 enactment and 1930 reenactment of § 526. Cf. *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U. S. 268, 280

(1980) (in interpreting a "statute enacted over 50 years ago, the view that once 'dominate[d] the field' is more enlightening than a recent state-law trend that has not motivated subsequent Congresses to amend the federal statute") (footnote omitted).

When § 526 was before Congress, the prevailing law held that a trademark's sole purpose was to identify for consumers the product's physical source or origin. See, *e. g., Macmahan Pharmacal Co.* v. *Denver Chemical Mfg. Co.*, 113 F. 468, 475 (CA8 1901). "Under this early 'source theory' of protection, trademark licensing was viewed as philosophically impossible, since licensing meant that the mark was being used by persons not associated with the real manufacturing 'source' in a strict, physical sense of the word." 1 McCarthy, Trademarks and Unfair Competition, at 826; see *Macmahan Pharmacal Co., supra,* at 475 ("An assignment or license without [a] transfer [of the business] is totally inconsistent with the theory upon which the value of a trademark depends"); H. Nims, The Law of Unfair Competition and Trade-Marks 46 (1917) (identifying *Macmahan* as "the usual rule"). Thus, any attempt by a trademark holder to authorize a third party to use its trademark worked an abandonment of the trademark, resulting in a relinquishment of ownership. See, *e. g., Everett O. Fisk & Co.* v. *Fisk Teachers' Agency, Inc.*, 3 F. 2d 7, 9 (CA8 1924).

Nor was it at all obvious then that a trademark owner could authorize the use of its trademark in one geographic area by selling it along with business and goodwill, while retaining ownership of the trademark in another geographic area. There were, as JUSTICE SCALIA points out, isolated suggestions that a foreign firm could validly assign to another the exclusive right to distribute the assignor's goods here under the foreign trademark. See *post,* at 326. The cases, however, were rife with suggestions to the contrary.[7] And we have found no contemporaneous case even suggesting that a domestic firm could retain ownership of a trademark after attempting to assign to another the right to use the trademark on goods that the other manufactured abroad. Cf. *Scandinavia Belting Co.* v. *Asbestos & Rubber Works of America, Inc.*, 257 F. 937, 956 (CA2 1919) (raising similar issue whether assignee of right to use trademark in the United States might use trademark on products not produced by the foreign manufacturer, but concluding "[t]hat question is not here and is not decided"). As one commentator writing as late as 1932 observed: "[T]here is much confusion in the books in regard to the transferability of trade marks and trade names. The law on the matter is neither clearly stated nor always uniformly applied." Grismore, The Assignment of Trade Marks and Trade Names, 30 Mich. L. Rev. 490, 491.[8]

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[7] See, *e. g., Independent Baking Powder Co.* v. *Boorman*, 175 F. 448, 454 (CC NJ 1910) ("[T]he assignor cannot, after the assignment, continue

Not until the 1930's did a trend develop approving of trademark licensing—so long as the licensor controlled the quality of the licensee's products—on the theory that a trademark might also serve the function of identifying product quality for consumers. 1 McCarthy, Trademarks and Unfair Competition, at 827–829; see Grismore, 30 Mich. L. Rev., at 499.

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the same identical business and at the same places as before, under unassigned trade-marks, and at the same time authorize his assignee to conduct the same business elsewhere under an assigned trade-mark"); *Eiseman* v. *Schiffer*, 157 F. 473 (CC SDNY 1907) (trademark owner may not assign trademark and then continue to engage in same business under different trademark).

[8] JUSTICE SCALIA cites *United Drug Co.* v. *Theodore Rectanus Co.*, 248 U. S. 90, 100–101 (1918), and *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 415 (1916), in support of his contention that the law by 1920 clearly permitted a trademark owner to retain ownership and use a trademark in one territory after assigning the identical trademark along with goodwill in another. *Post*, at 326. Those cases held only that a firm can develop a trademark that is identical to a trademark already in use in a geographically distinct and remote area if the firm is unaware of the identity. Thus, those cases bore on the territorial extent of trademark protection, not on the transferability of a trademark by territory once developed.

And not until the passage of the Lanham Trade-Mark Act in 1946 did that trend become the rule. See, *e. g., Dawn Donut Co.* v. *Hart's Food Stores, Inc.*, 267 F. 2d 358, 366–367 (CA2 1959). Similarly, it was not until well after § 526's enactment that it became clear that a trademark owner could assign rights in a particular territory along with goodwill, while retaining ownership in another distinct territory. See, *e. g., California Wine & Liquor Corp.* v. *William Zakon & Sons, Inc.*, 297 Mass. 373, 378, 8 N. E. 2d 812, 814 (1937).

Manifestly, the legislators who chose the term "owned by" viewed trademark ownership differently than we view it today. Any prescient legislator who could have contemplated that a trademark owner might license the use of its trademark would almost certainly have concluded that such a transaction would divest the licensor not only of the benefit of § 526's importation prohibition, but of *all* trademark protection; and anyone who gave thought to the possibility that a trademark holder might assign rights to use its trademark, along with business and goodwill, to an unrelated manufacturer in another territory had good reason to expect the same result. At the very least, it seems to me plain that Congress did not address case 3 any more clearly than it addressed case 2a, 2b, or 2c. To hold otherwise is to wrench statutory words out of their legislative and historical context and treat legislation as no more than a "collection of English words" rather than "a working instrument of government . . . ." *United States* v. *Dotterweich*, 320 U. S. 277, 280 (1943).

JUSTICE SCALIA's assertion that the foregoing analysis of case 3 is not based on the "resolution of textual 'ambiguity,'" *post*, at 323, depends on the proposition that an ancient statute is not ambiguous—and judges can never inform their interpretation with reference to legislative purpose—merely because the scope of its language has, by some fortuitous development, expanded to embrace situations that its drafters never anticipated. The proposition is unexceptionable where the postenactment development does not implicate the *purpose* of the statute. Thus, to use JUSTICE SCALIA's illustration, no one would doubt that "[a] 19th-century statute criminalizing the theft of goods" applies unambiguously to "theft of microwave ovens," *post,* at 323, for the postenactment development (the invention of new "goods") in no way implicates the statute's purpose (to deter "theft of goods"). The proposition is fallacious, however, when the postenactment development does implicate the statute's purpose. For example, had the same 19th-century legislature passed a statute requiring a utility commission to "inspect all ovens installed in a home for propensity to spew flames," the statute would not unambiguously apply to microwave or electric ovens. Although it would not be absurd to read the statute to cover such developments, a court might decline to do so, depending upon the extent to which the statute's purpose would be furthered by inspection of ovens that spew fewer flames than do conventional ovens. So too, the drastic doctrinal change in the nature of trademark ownership that occurred after § 526's enactment directly implicates the statute's purpose—to protect United States trademark owners from intrabrand competition arising from the manufacture abroad of trademarked goods by firms having certain relationships with the owner.

Since I believe that the application of § 526 to case 3 is ambiguous, the sole remaining question is whether Treasury's decision to exclude case 3 from § 526's prohibition is entitled to deference. The same considerations that lead me to uphold Treasury's treatment of the case 2 variations compel the same conclusion here. In the first place, the equities in case 3, as in case 2, differ significantly from the equities that motivated Congress to protect the prototypical gray-market victim (case 1) that purchases its trademark rights at arm's length from an independent manufacturer. While the prototypical gray-market victim stands to lose the full benefit of its bargain because of gray-market interference, the United States trademark holder that develops identical rights and authorizes a third party to use them abroad does not have the same sort of investment at stake. Similarly, while a trademark purchaser has no direct control over the importation of competing goods or over the manufacturer's sale abroad to third parties, the holder of a United States trademark in case 3 can avoid competition simply by declining to license its use abroad or even (if contractually permitted) revoking an already-issued license. Thus, it would have been perfectly rational for Congress to treat case 3 like case 2, excluding both from the § 526's prohibition.

The legislative history that I have already discussed at length confirms Congress' intent to do exactly that, and merely to overrule *Katzel.* There is no more indication that Congress intended to permit a United States trademark holder to prohibit importation of trademarked goods manufactured abroad under its authorization than that Congress intended to permit a United States trademark holder to exclude goods produced by its affiliates or divisions abroad.

Finally, Treasury has, at least since 1951, declined to protect trademark holders who authorize the use of their trademarks abroad. Almost as soon as the Lanham Trade-Mark Act codified the quality theory, enabling trademark holders to license the use of their trademarks without thereby relinquishing ownership, see *supra,* at 311, the Customs Service took the position that § 526's protection would be unavailable to domestic firms that authorized independent foreign firms to use their trademarks. See Letter from Customs Commissioner Dow to Sen. Douglas (Mar. 23, 1951), App. 52, 53 ("[A] foreign subsidiary *or licensee* of the United States trademark is considered to stand in the same shoes as such trademark owner") (emphasis added). See also T. D. 69–12(2), 3 Cust. Bull., at 17. Particularly in light of that longstanding agency interpretation, I would uphold the authorized-use exception as reasonable.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE BLACKMUN, and JUSTICE O'CONNOR join, concurring in part and dissenting in part.

I agree with the Court's analytic approach to this matter, and with its conclusion that subsection (c)(3) of the regulation, 19 CFR § 133.21(c)(3) (1987), is not a permissible construction of § 526(a) of the Tariff Act of 1930, 19 U. S. C. § 1526(a). I therefore join Parts I, II–A, and II–C of the Court's opinion. In my view, however, subsections (c)(1) and (c)(2) of the regulation are also in conflict with the clear language of § 526(a). I therefore decline to join Parts II–B and III of JUSTICE KENNEDY's opinion and dissent from that part of the judgment upholding subsections (c)(1) and (c)(2).

I

The Court observes that the statutory phrase "owned by" is ambiguous when applied to domestic subsidiaries of foreign corporations (case 2a). With this much I agree. It may be reasonable for some purposes to say that a trademark nominally owned by a domestic subsidiary is "owned by" its foreign parent corporation. This lawsuit would be different if the Customs Service regulation at issue here did no more than resolve this arguable ambiguity, by providing that a domestic subsidiary of a foreign parent could not claim the protection of § 526(a). In fact, however, that has never been asserted to be the theory of the regulation, and is assuredly not its only, or even its principal, effect. The authority to clarify an ambiguity in a statute is not the authority to alter even its unambiguous applications, and § 526(a) unambiguously encompasses most of the situations that the regulation purports to exclude.

Thus, the regulation excludes from § 526(a)'s import prohibition products bearing a domestic trademark that have been manufactured abroad by the trademark owner (case 2c), or by the trademark owner's subsidiary (case 2b). But the statutory requirement that the trademark be "owned by" a

United States citizen or corporation is unambiguous with respect to these two cases. A parent corporation may or may not be said to "own" the assets owned by its subsidiary, but no matter how that ambiguity is resolved it is impossible to conclude that a trademark owned by a United States corporation and applied abroad either by the corporation or its foreign subsidiary is "owned by" anyone other than a United States corporation.

Five Members of the Court (hereinafter referred to as "the majority") assert, however, that the regulation's treatment of situations 2b and 2c is attributable to the resolution of yet another ambiguity in § 526(a). See *ante*, at 292–293 (opinion of KENNEDY, J.); *ante*, at 299 (opinion of BRENNAN, J.). The statute excludes only merchandise "of foreign manufacture," which the majority says might mean "manufactured by a foreigner" rather than "manufactured in a foreign country." I think not. Words, like syllables, acquire meaning not in isolation but within their context. While looking up the separate word "foreign" in a dictionary might produce the reading the majority suggests, that approach would also interpret the phrase "I have a foreign object in my eye" as referring, perhaps, to something from Italy. The phrase "of foreign manufacture" is a common usage, well understood to mean "manufactured abroad." Hence, when statutes and regulations intend to describe the universe of manufactured goods, they do not refer to goods "of foreign or citizen manufacture," but to goods "of foreign or domestic manufacture." See, *e. g.*, 19 CFR § 133.21(a) (1987). I know of no instance in which anyone, anywhere, has used the phrase with the meaning the majority suggests—and the majority provides no example.

In the particular context of the present statute, however, the majority's suggested interpretation is not merely unusual but inconceivable, since it would have the effect of eliminating § 526(a)'s protection for some trademark holders in case 1—which contains what the Court describes as the "prototypical" gray-market victims. Not uncommonly a foreign trademark owner licenses an American firm to use its trademark in the United States and also licenses one or more other American firms to use the trademark in other countries. In this situation, the firm with the United States license could not keep out gray-market imports manufactured abroad by the other American firms, since, under the majority's interpretation, the goods would not be "of foreign manufacture." Thus, to save the regulation, the majority proposes an interpretation that undermines even the core of the statute.[1]

The majority does not insist that this queer reading is the best interpretation of "of foreign manufacture," but only that the Customs Service has adopted this construction of the statute as the basis for its regulation. That will come as a surprise to the Customs Service. The Government's petition for writ of certiorari in this very case states that § 526(a) deals not with goods manufactured by foreigners, but rather with "goods manufactured abroad," "genuine foreign-made goods," "[g]enuine goods manufactured abroad," "goods produced abroad." Pet. for Cert. in No. 86–625, p. 3. As far as I can discern, that accords with the absolutely uniform Customs Service interpretation. For example, the Customs

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[1] JUSTICE KENNEDY suggests that "the regulation speaks to [this] hypothetical situation," since it "allows a company justifiably invoking the protection of the statute to bar the importation of goods of foreign or domestic manufacture. 19 CFR § 133.21(a) (1987)." *Ante*, at 293, n. 4. This suggestion is puzzling. If, as the majority believes (or as it believes the Customs Service believes), the statute does not exclude the goods in this situation, it is hard to understand how the *regulation* could do so. The reality, in any case, is that subsection (a) of § 133.21 has nothing to do with § 526(a), but rather implements § 42 of the Lanham Trade-Mark Act, 15 U. S. C. § 1124, which prohibits importation of goods of foreign or domestic manufacture bearing not genuine trademarks identical to a United States trademark, but trademarks that "copy or simulate" a recorded trademark. It is subsection (b) of § 133.21 that implements § 526(a), and which, consistent with that statute, only prohibits importation of "[f]oreign-made [but not domestic-made] articles bearing a trademark identical with one owned" by a United States trademark holder.

Service cites (Brief for Federal Petitioners 38, n. 46) the 1951 correspondence from the Commissioner of Customs to Senator Douglas describing § 526(a):

> "As interpreted by the [Customs] Bureau, section 526 prohibits the importation of genuine articles *of foreign origin* bearing a genuine trade-mark. . . . For example: if the foreign owner of a trade-mark applied to *articles manufactured in a foreign country* assigns the United States rights [to a United States citizen] *no articles of foreign origin* bearing such mark . . . may be imported." App. 53 (emphasis added).

Perhaps most telling of all is the Commissioner's description, in this letter, of the common-ownership exception:

> "However, if the United States trade-mark owner and the owner of the foreign rights to the same mark are one and the same person, *articles produced and sold abroad* by the foreign owner may be imported by anyone. . . ." *Ibid.* (emphasis added).

The Commissioner's reference to articles produced and sold abroad was not original, but paraphrased the language of the earliest regulation articulating the common-ownership exception to § 526(a) ("merchandise manufactured or sold in a foreign country") which was reiterated in regulations promulgated in 1937, 1943, 1947, and 1969. See Cust. Reg. 1931, art. 518(b), as amended, T. D. 48537, 70 Treas. Dec. 336–337 (1936); Cust. Reg. 1937, art. 537(b); Cust. Reg. 1943, 19 CFR § 11.14(b) (1943); Cust. Reg. 1947, 19 CFR § 11.14(b) (1947); 19 CFR § 11.14(b) (1969). It is a strange sort of deference to agency interpretation which adopts a view of the statute that the agency clearly rejects.

If it were, as JUSTICE KENNEDY believes, "the current interpretation of the regulations we are sustaining," *ante*, at 293, n. 4, one would expect there to be in place some mechanism that enables the Customs Service to identify goods that are not only manufactured abroad but also (as the majority's interpretation requires) manufactured by foreigners. Acquiring this knowledge cannot be easy, since the importer of merchandise will often not know the manufacturer's identity, much less its corporate pedigree. International corporate ownership, not a matter of public record, is often a closely guarded secret. Yet although there *is* in place a regulation requiring the country of origin (*i. e.*, whether "manufactured abroad") to be plainly indicated on all imports, see 19 CFR §§ 134.0–134.55 (1987), there is none requiring the nationality of the manufacturer to be stated. After today's decision, of course, the Customs Service, if it would not rather amend its regulations, will presumably have to devise means to enforce what we say it has been enforcing.

Which suggests one of the most important reasons we defer to an agency's construction of a statute: its expert knowledge of the interpretation's practical consequences. Since the Government has never advocated the interpretation proposed by the majority (although these cases have been argued twice), and since we did not so much as ask for additional briefing after conceiving of the novel interpretation, we cannot be sure what other difficulties it will create. It might, for example, conflict with mutually accepted understandings of our commercial treaty commitments to foreign countries, such as the provision in our Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, October 29, 1954, that "[n]ationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment by the other Party with respect to all matters relating to importation and exportation." [1956] 7 U. S. T. 1839, T. I. A. S. No. 3593, art. XIV, ¶ 4. I doubt, in any case, that our trade partners will look favorably upon a regulation which, as now interpreted, treats goods manufactured by American companies on their soil more favorably than goods manufactured there by their own nationals.

I find it extraordinary for this Court, on the theory of deferring to an agency's judgment, to burden that agency with an interpretation that it not only has never suggested, but that is contrary to ordinary usage, to the purposes of the statute, and to the interpretation the agency appears to have applied consistently for half a century.

II

Section 526(a) also unambiguously embraces a third situation that the regulation excludes—namely, the situation (case 3) in which a domestic trademark owner and registrant authorizes a foreign firm to use its United States trademark abroad. There, the United States trademark is unambiguously "owned by" a United States firm, and registered by a firm "domiciled in the United States," and the goods sought to be imported are "of foreign manufacture." According to JUSTICE BRENNAN, however, thus reading the words to mean what they say "bespeaks stolid anachronism not solid analysis," because "[a]ny prescient legislator who could have contemplated that a trademark owner might license the use of its trademark would almost certainly have concluded that such a transaction would divest the licensor not only of the benefit of § 526's importation prohibition, but of *all* trademark protection." *Ante*, at 312, 315.

There may be an anachronism here, but if so it is the statute itself—which Congress has chosen not to update—and not the faithful reading of it to cover what it covers. JUSTICE BRENNAN characterizes his view as the resolution of textual "ambiguity," but it has nothing to do with that. A 19th-century statute criminalizing the theft of goods is not ambiguous in its application to the theft of microwave ovens simply because the legislators enacting it "were unlikely to have contemplated" those appliances; and a 1922 (or 1930) statute covering a "corporation . . . organized within, the United States" unambiguously includes a United States corporation that has licensed its trademark abroad, whether or not a United States corporation with that characteristic existed at the time.[2] JUSTICE BRENNAN is asserting that we have the power—indeed, the obligation, lest we commit a "stolid anachronism"—to decline to apply a statute to a situation that its language concededly covers, not on the ground that the enacting Congress actually intended but failed to express such an exception, nor even on the ground that failure to infer such an exception produces an absurd result, but on the ground that, *if* the enacting Congress had foreseen modern circumstances, it *would* have adopted such an exception, since otherwise the effect of the law would extend beyond its originally contemplated purpose. I confess never to have heard of such a theory of statutory construction. The principle of our democratic system is not that each legislature enacts a purpose, independent of the language in a statute, which the courts must then perpetuate, assuring that it is fully achieved but never overshot by expanding or ignoring the statutory language as changing circumstances require. To the contrary, it seems to me the prerogative of each currently elected Congress to allow those laws which change has rendered nugatory to die an unobserved death if it no longer thinks their purposes worthwhile; and to allow those laws whose effects have been expanded by change to remain alive if it favors the new effects. In the last analysis it is JUSTICE BRENNAN's approach that "bespeaks stolid anachronism," because in theory it requires judges to rewrite the United States Code to accord with the unenacted purposes of Congresses long since called home. (The reality, I fear, may be even worse than the theory. In practice, the rewriting is less likely to accord with the legislative purposes of yesteryear than the judicial predelictions of today.)

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[2] JUSTICE BRENNAN responds with the example of an old statute requiring agency inspection of "all ovens" for their propensity to spew flames. This statute is asserted to be ambiguous with respect to modern microwave or electric ovens because its purpose would not be served. *Ante*, at 315–316. With respect to microwave ovens there may indeed be an ambiguity—not because the purpose would not be served but because the term "oven" connotes "a heated enclosure," Webster's Third New International Dictionary 1605 (1981), and may or may not embrace microwave ovens. With respect to electric ovens, there seems to me no ambiguity at all. Perhaps the statute should not be interpreted to cover electric ovens, but if so it would not be because of ambiguity but because (1) electric ovens are incapable of spewing flames, (2) it is therefore absurd to inspect electric ovens for that propensity, and (3) it is a venerable principle that a law will not be interpreted to produce absurd results.

"The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.'" *United States* v. *Kirby*, 7 Wall. 482, 487 (1869) (citations omitted).

Nothing in JUSTICE BRENNAN's example suggests that we can simply disregard a phrase, such as "corporation . . . organized within . . . the United States," whose unambiguous application produces a result that is not at all absurd but merely (in JUSTICE BRENNAN's estimation) beyond the contemplation of the enacting Congress.

But it is not really necessary to conduct the discourse at such a philosophical level in order to reject what JUSTICE BRENNAN proposes. For even those who would support the power of a court to disregard the plain application of a statute when changed circumstances cause its effects to exceed the original legislative purpose would concede, I must believe, that such power should be exercised only when (1) it is clear that the alleged changed circumstances were unknown to, and unenvisioned by, the enacting legislature, and (2) it is clear that they cause the challenged application of the statute to exceed its original purpose. Here both of those conditions, far from being clearly satisfied, are almost certainly not met.

JUSTICE BRENNAN asserts that legislators in 1922 or 1930 were unlikely to have contemplated that a trademark owner could assign his trademark unless he simultaneously conveyed the goodwill and business associated with the mark.

Ante, at 313–314. But the prohibition on assigning a trademark apart from its associated goodwill has not been eliminated. See 15 U. S. C. § 1060. And no more in 1922 than today did it preclude assignment of the trademark and goodwill on a region-by-region basis. By 1920, it was firmly established that unrelated businesses could own and use an identical trademark so long as the uses were confined to different and distinct regions. See *United Drug Co.* v. *Theodore Rectanus Co.*, 248 U. S. 90, 100–101 (1918); *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 415 (1916). As a consequence, a trademark holder doing business in two distinct territories was free to assign the business, goodwill, and rights to the trademark in one of the regions. See, *e. g.*, *Scandinavia Belting Co.* v. *Asbestos & Rubber Works of America, Inc.*, 257 F. 937, 953–956 (CA2 1919); *Battle Creek Toasted Corn Flake Co.* v. *Kellogg Toasted Corn Flake Co.*, 54 Ont. L. Rep. 537, 546, 550 (1923); see also *Apollinaris Co.* v. *Scherer*, 27 F. 18, 19–20 (CC SDNY 1886) (dicta); cf. *Saxlehner* v. *Eisner & Mendelson Co.*, 179 U. S. 19 (1900) (a trademark owner does not abandon his trademark if he continues to use it domestically while granting another party the exclusive right to sell the product in certain foreign countries).[3] Similarly, a firm that used its trademark in one business, say manufacturing cola syrup, could transfer rights to use the trademark in another business, such as bottling cola-flavored soda. See *Coca-Cola Bottling Co.* v. *Coca-Cola Co.*, 269 F. 796, 806–808 (DC Del. 1920). It was also well established that different parties using an identical trademark in different regions, or for different purposes, could enter into a consent agreement authorizing each party to continue the nonconflicting uses. See *Waukesha Hygeia Mineral Springs Co.* v. *Hygeia Sparkling Distilled Water Co.*, 63 F. 438, 441 (CA7 1894). JUSTICE BRENNAN correctly notes that trademark law now recognizes, as it had only begun to recognize in 1930, that a trademark may be licensed for use by different firms in the same or overlapping regions, *ante*, at 314–315. That change in the law, however, plays almost no part in the application of § 526(a). Since international trademark licensing is interregional, a statute that applies only to imported goods is hardly affected by a change in trademark law concerning intraregional licensing. Finally, there is direct proof that Congress appreciated the possibility of territorial assignment of trademarks. JUSTICE BRENNAN acknowledges that the 1922 Congress was well aware of, and indeed was motivated by, the case of *A. Bourjois & Co.* v. *Katzel*, 275 F. 539 (CA2 1921), which presented a textbook example of an assignment of the right to use a trademark in a distinct market. Although Congress understood that a United States trademark owner could authorize the use of its mark abroad, Congress nonetheless chose not to create an exception to § 526(a) for that situation.

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[3] JUSTICE BRENNAN's only attempt to provide case-law support for the proposition that regional trademark licensing was impermissible consists of a reference to dicta in *Independent Baking Powder Co.* v. *Boorman*, 175 F. 448 (CC NJ 1910), and *Eiseman* v. *Schiffer*, 157 F. 473 (CC SDNY 1907), see *ante*, at 313–314, n. 7. The latter case contains nothing more than statements of the principle that a trademark cannot be assigned separately from the business to which it pertains—which says nothing about whether business and trademark can be conveyed on a regional basis. The former case does contain the seemingly pertinent remark, quoted by JUSTICE BRENNAN, that "the assignor cannot, after the assignment, continue the same identical business and at the same places as before, under unassigned trade-marks, and at the same time authorize his assignee to conduct the same business *elsewhere* under an assigned trade-mark." 175 F., at 454 (emphasis added). On the facts of the case, however, "elsewhere" was elsewhere in the same market in which the licensor continued to do busi-

Nor does it seem to me that the second condition for disregarding the words of the statute is met: that the original legislative purpose is not served by its text. I cannot agree that "the equities in case 3 . . . differ significantly from the

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ness. The basis of the holding and of the dictum was, once again, that a trademark is not assignable separately from the business to which it pertains. There is no reason to believe that the court, even in dictum, was addressing the question of regional licensing.

equities that motivated Congress to protect the prototypical gray-market victim (case 1)," the United States assignee of a foreign trademark. *Ante*, at 316. The United States assignee's innocent vulnerability to gray-market imports is no greater than that of the United States trademark owner who assigns the right to use his trademark abroad—and whom JUSTICE BRENNAN would deprive of § 526(a)'s protection. I cannot understand why the latter victim "does not have the same sort of investment at stake," *ante*, at 317. If anything, his investment may be even greater, consisting of the entire goodwill associated with his trademark in this country. Nor do I understand why he has more "direct control" over the harm, *ibid*. The means of control available to the United States assignor are precisely those available to the United States assignee: he can either decline to participate in the assignment from the beginning, or contractually preclude the other party to the assignment from parallel importation. The latter is as unlikely to be effective in the one case as in the other since the bulk of the gray market is attributable to third parties that are unaffiliated with either the manufacturer or the trademark holder. That same phenomenon renders inexplicable JUSTICE BRENNAN's perception that all affiliated trademark holders are less in need of, or less deserving of, § 526(a) protection against the products of their foreign affiliates. It is not the affiliates who are doing the damage but third parties.

In sum, while congressional attention to the problem addressed by § 526(a) may have been prompted by the gray-marketeering represented by *A. Bourjois & Co.* v. *Katzel*, *supra*, the language of the statute goes well beyond that narrow case to cover the same inequity in other contexts. Even if Congress could not have envisioned those other contexts I would find no reasonable basis to disregard what the statute plainly says; but to make the case complete, it surely must have envisioned them.

* * *

I of course agree that to the extent § 526(a) is ambiguous we need only determine whether the Customs Service's interpretation of the statute is reasonable, see *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). But we owe no deference to a construction that is contrary to the interpretation of the agency. I would therefore hold invalid, in addition to subsection (c)(3) of the regulation, subsections (c)(1) and (c)(2).

MONESSEN SOUTHWESTERN RAILWAY CO. *v.* MORGAN

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

No. 86–1743. Argued February 22, 1988—Decided June 6, 1988

Appellee suffered a permanent back injury while working as a brakeman and conductor for appellant railroad. After returning to work in a less physically demanding position, appellee brought an action under the Federal Employers' Liability Act (FELA) in a Pennsylvania state court, alleging that his injury was attributable to appellant's negligence and that his future earning power had been impaired as a result of his injury. The trial judge refused to instruct the jury that any damages award for loss of future earnings should be reduced to present value, but instead informed the jury that the law (apparently referring to Pennsylvania case law) "now provides that there need not be such a reduction." After the jury found for appellee and awarded damages, the trial judge assessed an additional amount as prejudgment interest pursuant to Pennsylvania Rule of Civil Procedure 238, which requires state courts in personal injury actions to add to compensatory damages 10 percent per year, as "damages for delay," from the date the complaint was filed or from the date one year after the cause of action accrued, whichever was later, to the date of the verdict. The Pennsylvania Superior Court affirmed. The Pennsylvania Supreme Court also affirmed, characterizing Rule 238 as a mere "rule of procedure," and holding that it was not inconsistent with FELA. It also held that whether the trial judge properly refused to instruct the jury to discount future damages to present value and instead applied the "total offset" method, under which future inflation is presumed equal to future interest rates, was a question of federal law, and that the judge's use of the total offset rule was not inconsistent with *St. Louis Southwestern R. Co.* v. *Dickerson*, 470 U. S. 409.

Held:

1. State courts may not award prejudgment interest pursuant to local practice in FELA actions. Pp. 334–339.

(a) The proper measure of damages under FELA—including the question whether prejudgment interest may be awarded to a prevailing plaintiff—is inseparably connected with the right of action, and therefore is an issue of substance that must be settled according to federal law rather than state law. The Pennsylvania courts cannot avoid the application of federal law by characterizing Rule 238 as nothing more than a procedural device to encourage settlements and relieve court congestion. Pp. 335–336.

(b) Federal law does not authorize awards of prejudgment interest in FELA actions. Although neither FELA nor the general federal interest statute, 28 U. S. C. § 1961, mentions prejudgment interest, when Congress enacted FELA in 1908 the common law did not allow prejudgment interest in suits for personal injury or wrongful death, and that was the rule in the federal courts. In enacting FELA, Congress expressly dispensed with other common-law doctrines of that era, and there is no indication that Congress intended to abrogate the doctrine barring prejudgment interest *sub silentio.* Moreover, the lower federal courts and the state courts have held with virtual unanimity that prejudgment interest is not available under FELA. Congress' failure to disturb such a longstanding, consistent judicial interpretation of a statute indicates that Congress at least acquiesces in, and apparently affirms, that interpretation. Pp. 336–339.

2. The trial court did not act consistently with federal law in instructing the jury not to discount appellee's future lost earnings to present value. *St. Louis Southwestern R. Co.* v. *Dickerson, supra.* The jury has the task of making the present value determination in FELA cases, but it is permissible for the judge to recommend to the jury one or more methods of calculating present value so long as the judge does not in effect pre-empt the jury's function. In the present case, however, the trial judge instructed the jury that a zero discount rate was to be applied as a matter of law to appellee's future damages. The instruction improperly took from the jury the essentially factual question of the appropriate rate at which to discount appellee's FELA award to present value. Pp. 339–342.

513 Pa. 86, 518 A. 2d 1171, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, STEVENS, SCALIA, and KENNEDY, JJ., joined, in Parts I, II–A, and III of which MARSHALL and BLACKMUN, JJ., joined, and in Parts I and II of which REHNQUIST, C. J., and O'CONNOR, J., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post,* p. 342. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., joined, *post,* p. 350.

Paul A. Manion argued the cause for appellant. With him on the briefs was *James G. McLean.*

Thomas Hollander argued the cause for appellee. With him on the brief was *Michael F. Campanella*.*

JUSTICE WHITE delivered the opinion of the Court.

This case concerns the application of state-law rules affecting the measure of damages in an action brought in state court under the Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.*

I

Appellee was employed by appellant as a railroad brakeman and conductor. In August 1977, appellee fell while alighting from a railroad car and suffered a permanent injury to his back. He returned to work in February 1979 in the less physically demanding position of radio and supply clerk.

Appellee brought an FELA action in the Court of Common Pleas of Allegheny County, Pennsylvania, alleging that his fall was attributable to appellant's negligence. He claimed that his future earning power had been impaired as a result of his injury because he could not obtain certain incentive and shift differential payments in his new position.

The trial judge refused to instruct the jury that any damages award for loss of future earnings would have to be reduced to present value. Instead, she informed the jury that "[t]he law now provides that there need not be such a reduction." App. 61. The judge apparently was referring to the Pennsylvania Supreme Court's decision in *Kaczkowski* v. *Bolubasz*, 491 Pa. 561, 583, 421 A. 2d 1027, 1038–1039 (1980), which had instructed state courts to cease discounting future lost earnings to present value because "as a matter of law . . . future inflation shall be presumed equal to future interest rates with these factors offsetting."

The jury found in favor of appellee and awarded damages of $125,000. The trial judge assessed an additional $26,712.50 as prejudgment interest pursuant to Rule 238 of the Pennsyl-

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**Betty Jo Christian* and *Charles G. Cole* filed a brief for the Association of American Railroads as *amicus curiae*.

vania Rules of Civil Procedure. Rule 238 requires state courts in personal injury actions to "add to the amount of compensatory damages . . . , damages for delay at ten (10) percent per annum, not compounded," from "the date the plaintiff filed the initial complaint in the action or from a date one year after the accrual of the cause of action, whichever is later," to the date of the verdict.[1] The judge rejected appellant's contention that Rule 238 could not be applied to FELA actions.

A three-judge panel of the Pennsylvania Superior Court affirmed. 339 Pa. Super. 465, 489 A. 2d 254 (1985).

The Pennsylvania Supreme Court granted appellant's petition for allowance of appeal and subsequently affirmed by a narrow margin. 513 Pa. 86, 518 A. 2d 1171 (1986).

The court characterized Rule 238 as a mere "rule of procedure" designed to encourage meaningful settlement negotiations and thereby alleviate congestion in the trial courts. *Id.*, at 98–99, 518 A. 2d, at 1177. The court concluded that, as neither the "worthy goal" nor the specific provisions of Rule 238 contravened the purposes and provisions of the FELA, the Pennsylvania courts could apply Rule 238 to award prejudgment interest in FELA cases as well as in cases involving only state law. *Ibid.*

The court recognized that whether the trial judge had properly refused to instruct the jury to discount future damages to present value, and instead applied the so-called "total offset" method, was a question of federal law. See *St. Louis Southwestern R. Co.* v. *Dickerson*, 470 U. S. 409, 411 (1985) *(per curiam)*. The court noted our discussion of a Federal District Court's use of Pennsylvania's total offset rule in *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U. S. 523 (1983), a case brought under the Longshoremen's and Harbor

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[1] Rule 238 provides that, if the defendant made a pretrial settlement offer and the plaintiff's recovery does not exceed 125 percent of that offer, the court cannot award "delay damages" for the period after the offer was made.

Workers' Compensation Act (LHWCA), 33 U. S. C. § 904. We held in *Pfeifer* that "whatever rate the District Court may choose to discount the estimated stream of future earnings, it must make a deliberate choice, rather than assuming that it is bound by a rule of state law." 462 U. S., at 552–553. Here, the trial judge's use of the total offset rule was held to have been permissible under *Pfeifer* because the reviewing court had itself "deliberately selected" that rule in *Kaczkowski* v. *Bolubasz* "after a thorough consideration of various present worth theories and rules." 513 Pa., at 92–93, 518 A. 2d, at 1174. Nor did the court find any inconsistency between the trial judge's use of the total offset rule and our holding in *Dickerson* that "an utter failure to instruct the jury that present value is the proper measure of [an FELA] damages award is error." 470 U. S., at 412. Here, reasoned the court, "the trial judge did instruct the jury on present value by charging on the total offset method." 513 Pa., at 94–95, 518 A. 2d, at 1175.[2]

We noted probable jurisdiction, 484 U. S. 813 (1987), and now reverse.

II

We first consider whether state courts may award prejudgment interest pursuant to local practice in actions brought under the FELA.

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[2] The three dissenting justices maintained that the trial court's award of "delay damages" under Rule 238 contravened federal substantive law and "undermine[d] the national uniformity FELA was designed to achieve." 513 Pa., at 102, 518 A. 2d, at 1179. They dismissed as "pure sophistry" the majority's assertion that Rule 238 was a mere procedural device, observing that "[a]ny rule which increases a damage award by twenty-five percent has an undeniably material effect on damages." *Id.*, at 101–102, 518 A. 2d, at 1179. In addition, said the dissenters, the trial judge's refusal to instruct the jury to discount any future damages to present value was inconsistent with federal law. The trial judge had "blindly applied" the Pennsylvania total offset rule, they asserted, and had not made the "deliberate choice" among present value theories required by *St. Louis Southwestern R. Co.* v. *Dickerson*, 470 U. S. 409 (1985). 513 Pa., at 100, 518 A. 2d, at 1178.

A

State courts are required to apply federal substantive law in adjudicating FELA claims. *Dickerson*, *supra*, at 411; *Chesapeake & Ohio R. Co.* v. *Kuhn*, 284 U. S. 44, 46–47 (1931). It has long been settled that "the proper measure of damages [under the FELA] is inseparably connected with the right of action," and therefore is an issue of substance that "must be settled according to general principles of law as administered in the Federal courts." *Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U. S. 485, 491 (1916); see also *Dickerson*, *supra*, at 411; *Norfolk & Western R. Co.* v. *Liepelt*, 444 U. S. 490, 493 (1980).

The question of what constitutes "the proper measure of damages" under the FELA necessarily includes the question whether prejudgment interest may be awarded to a prevailing FELA plaintiff. Prejudgment interest is normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered. *West Virginia* v. *United States*, 479 U. S. 305, 310, and 310–311, n. 2 (1987); *General Motors Corp.* v. *Devex Corp.*, 461 U. S. 648, 655–656 (1983); *Poleto* v. *Consolidated Rail Corporation*, 826 F. 2d 1270, 1278 (CA3 1987); *Wilson* v. *Burlington Northern R. Co.*, 803 F. 2d 563, 566 (CA10 1986) (McKay, J., concurring), cert. denied, 480 U. S. 946 (1987). Moreover, prejudgment interest may constitute a significant portion of an FELA plaintiff's total recovery. Here, for example, the trial court's award of $26,712.50 in prejudgment interest under Rule 238 increased appellee's total recovery by more than 20 percent. Accordingly, the Pennsylvania courts erred in treating the availability of prejudgment interest in FELA actions as a matter of state law rather than federal law.[3]

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[3] Other courts have uniformly recognized that the availability of prejudgment interest under the FELA is a question of federal law. See, *e. g.*, *Poleto* v. *Consolidated Rail Corporation*, 826 F. 2d 1270, 1274 (CA3 1987); *Louisiana & Arkansas R. Co.* v. *Pratt*, 142 F. 2d 847, 848 (CA5 1944); *Chicago, M., St. P. & P. R. Co.* v. *Busby*, 41 F. 2d 617, 619 (CA9 1930); *Carmouche* v. *Southern Pacific Transportation Co.*, 734 S. W. 2d

The Pennsylvania courts cannot avoid the application of federal law to determine the availability of prejudgment interest under the FELA by characterizing Rule 238 as nothing more than a procedural device to relieve court congestion. In *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359 (1952), the Ohio courts had applied a state procedural rule in an FELA action that permitted the judge rather than the jury to resolve factual questions as to whether a release had been fraudulently obtained. We reversed on the ground that "the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used." *Id.*, at 363. See also *Brown* v. *Western R. Co. of Alabama*, 338 U. S. 294, 298–299 (1949). Similarly, prejudgment interest constitutes too substantial a part of a defendant's potential liability under the FELA for this Court to accept a State's classification of a provision such as Rule 238 as a mere "local rule of procedure."[4] We therefore turn to the issue whether federal law authorizes awards of prejudgment interest in FELA actions.

B

Neither the FELA itself nor the general federal interest statute, 28 U. S. C. § 1961, makes any mention of prejudgment interest. It is true that Congress' silence as to the availability of interest on an obligation created by federal law does not, without more, "manifes[t] an unequivocal congres-

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46, 47 (Tex. App. 1987); *Wicks* v. *Central R. Co.*, 129 N. J. Super. 145, 147, 322 A. 2d 488, 489, cert. denied, 66 N. J. 317, 331 A. 2d 17 (1974); *Mobile & O. R. Co.* v. *Williams*, 219 Ala. 238, 249, 121 So. 722, 731 (1929).

[4] The Court of Appeals for the Third Circuit recognized in an FELA action that Rule 238 is substantive in nature. *Poleto* v. *Consolidated Rail Corporation*, *supra*, at 1274. Indeed, even the Pennsylvania Supreme Court has acknowledged that Rule 238 has "both procedural and substantive elements." *Laudenberger* v. *Port Authority of Allegheny County*, 496 Pa. 52, 66, 436 A. 2d 147, 154 (1981).

sional purpose that the obligation shall not bear interest." *Rodgers* v. *United States*, 332 U. S. 371, 373 (1947).

We can discern a sufficiently clear indication of legislative intent with regard to prejudgment interest under the FELA, however, when we consider Congress' silence on this matter in the appropriate historical context. In 1908, when Congress enacted the FELA, the common law did not allow prejudgment interest in suits for personal injury or wrongful death. See C. McCormick, Law of Damages § 56 (1935); 1 T. Sedgwick, Measure of Damages § 316 (9th ed. 1912).[5] This was the rule in the federal courts. *Pierce* v. *United States*, 255 U. S. 398, 406 (1921);[6] *Mowry* v. *Whitney*, 14 Wall. 620, 653 (1872); see also *Poleto, supra*, at 1276, 1278; *Wilson, supra*, at 565; *Louisiana & Arkansas R. Co.* v. *Pratt*, 142 F. 2d 847, 848 (CA5 1944). Congress expressly dispensed with other common-law doctrines of that era, such as the defense of contributory negligence, see 45 U. S. C. § 53, in order "to provide liberal recovery for injured workers" under the FELA. *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 432 (1958). But Congress did not deal at all with the equally well-established doctrine barring the recovery of prejudgment interest, and we are unpersuaded that Congress intended to abrogate that doctrine *sub silentio.*[7]

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[5] As JUSTICE BLACKMUN's dissent concedes, the authorities recognized even two decades after the enactment of the FELA that "interest usually was not awarded" in personal injury actions involving claims for both economic and noneconomic injury. *Post*, at 347 (citing McCormick § 56, p. 224).

[6] In *Pierce*, the Government obtained a criminal judgment against a corporation, and a fine was imposed. The Government then brought a civil action against the corporation's shareholders to satisfy the judgment. The Court held that the Government was entitled to interest only from the date of the civil judgment and not from the date of the prior criminal judgment. It was observed that "[a]t common law judgments do not bear interest; interest rests solely upon statutory provision." 255 U. S., at 406. Accordingly, as the only applicable statute provided for postjudgment interest in civil actions, the Government could not obtain interest prior to the date of the civil judgment either as postjudgment interest in the criminal action or as prejudgment interest in the civil action.

Moreover, we have recognized that Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that "Congress at least acquiesces in, and apparently affirms, that [interpretation]." *Cannon* v. *University of Chicago*, 441 U. S. 677, 703 (1979); see also *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 200–201 (1974); *Flood* v. *Kuhn*, 407 U. S. 258, 283–284 (1972). The federal and state courts have held with virtual unanimity over more than seven decades that prejudgment interest is not available under the FELA. See, *e. g.*, *Poleto*, 826 F. 2d, at 1279; *Wilson*, 803 F. 2d, at 566; *Kozar* v. *Chesapeake & Ohio R. Co.*, 449 F. 2d 1238, 1244 (CA6 1971); *Pratt*, *supra*, at 848–849; *Chicago, M., St. P. & P. R. Co.* v. *Busby*, 41 F. 2d 617, 619 (CA9 1930); *Carmouche* v. *Southern Pacific Transportation Co.*, 734 S. W. 2d 46, 47 (Tex. App. 1987); *Melin* v. *Burlington Northern R. Co.*, 401 N. W. 2d 418, 420 (Minn. App. 1987); *Wicks* v. *Central R. Co.*, 129 N. J. Super. 145, 147, 322 A. 2d 488, 489, cert. denied, 66 N. J. 317, 331 A. 2d 17 (1974); *Murmann* v. *New York, N. H. & H. R. Co.*, 258 N. Y. 447, 450, 180 N. E. 114, 115 (1932) *(per curiam)*; *Mobile & O. R. Co.* v. *Williams*, 219 Ala. 238, 249, 121 So. 722, 731 (1929); *Bennett* v. *Atchison, T. & S. F. R. Co.*, 187 Iowa 897, 903–904, 174 N. W. 805, 807 (1919); *Grow* v. *Oregon Short Line R. Co.*, 47 Utah 26, 29, 150 P. 970, 971 (1915). Congress has amended the FELA on several occasions since 1908. See 36 Stat. 291 (1910); 53 Stat. 1404 (1939); 62 Stat.

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[7] Similarly, the Court refused in an early FELA case to depart from the common-law rule that a right of action for personal injury was extinguished by the death of the injured party. See *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 59, 67–68 (1913). The Court noted that the FELA did not expressly provide for the survival of the injured employee's right of action, and that state survival statutes were inapplicable because "[t]he question of survival is not one of procedure, 'but one which depends on the substance of the cause of action.'" *Id.*, at 67 (quoting *Schreiber* v. *Sharpless*, 110 U. S. 76, 80 (1884)).

989 (1948). Yet, Congress has never attempted to amend the FELA to provide for prejudgment interest.[8] We are unwilling in the face of such congressional inaction to alter the longstanding apportionment between carrier and worker of the costs of railroading injuries. If prejudgment interest is to be available under the FELA, then Congress must expressly so provide.[9]

III

We turn now to the question whether the trial court acted consistently with federal law in instructing the jury not to discount appellee's future lost earnings to present value.

We have consistently recognized that "damages awards in suits governed by federal law should be based on present value." *Dickerson*, 470 U. S., at 412. The "self-evident" reason is that "a given sum of money in hand is worth more than the like sum of money payable in the future." *Kelly*, 241 U. S., at 489; see also *Dickerson*, *supra*, at 412. And, as

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[8] Congress considered a proposal to authorize prejudgment interest under the general federal interest statute, 28 U. S. C. § 1961, during deliberations on the Federal Courts Improvement Act of 1982, Pub. L. 97-164, 96 Stat. 25. The proposal was omitted from the final legislation. S. Rep. No. 97-275, pp. 11-12 (1981).

[9] JUSTICE BLACKMUN's dissent does not recognize the obvious difference between the instant case and previous cases in which the Court allowed prejudgment interest on certain pecuniary losses. See, *e. g.*, *General Motors Corp.* v. *Devex Corp.*, 461 U. S. 648, 654-656 (1983); *Jacobs* v. *United States*, 290 U. S. 13, 16-17 (1933); *Waite* v. *United States*, 282 U. S. 508, 509 (1931). In none of those cases did the plaintiff seek prejudgment interest on a cause of action arising under a statute that, like the FELA, was enacted at a time when prejudgment interest was generally unavailable on similar causes of action arising under the common law. The Court would have had no occasion in those cases to consider whether the Congress that adopted the statute under which prejudgment interest was sought intended to dispense *sub silentio* with a well-established common-law rule barring prejudgment interest on similar claims. Hence, we cannot accept the dissent's characterization of our analysis as a "departure from our normal inquiry into the relation between an allowance of interest and Congress' purpose in creating [the underlying] obligation." *Post*, at 348.

Kelly and *Dickerson* demonstrate, the rule governs in FELA cases. Hence, a "failure to instruct the jury that present value is the proper measure of a damages award is error." 470 U. S., at 412.

Here, the trial court instructed the jury that although it "used to be" that juries were to reduce an award to "something called present worth," the law now provided that there need not be such a reduction. Tr. 701–702. The "law" referred to was the Pennsylvania Supreme Court's decision in *Kaczkowski* v. *Bolubasz*, 491 Pa. 561, 421 A. 2d 1027 (1980), which held that future inflation would be conclusively presumed to equal future interest rates and that state courts in Pennsylvania therefore were not to reduce damages to present worth. It was error for the court to have refused on the basis of this state rule to allow an FELA award to be reduced to present value, just as it was error for the court in *Pfeifer* to have failed to make "a deliberate choice" as to how an LHWCA award was to be reduced to present value and to have "assum[ed] that it [was] bound by a rule of state law." 462 U. S., at 553.

Under the Court's FELA cases, the jury has the task of making the present value determination. It was observed in *Kelly*, for example, that "it may be a difficult mathematical computation for the ordinary juryman to calculate interest on deferred payments, with annual rests, and reach a present cash value." 241 U. S., at 491. We declined to decide in that case "[w]hether the difficulty should be met by admitting the testimony of expert witnesses, or by receiving in evidence the standard interest and annuity tables in which present values are worked out at various rates of interest and for various periods covering the ordinary expectancies of life." *Ibid.* We did not suggest that the difficulty could also be met by permitting the present value calculation to be made by the judge rather than the jury.

The question was addressed more directly two years later in *Louisville & Nashville R. Co.* v. *Holloway*, 246 U. S. 525

(1918), which held that an FELA defendant was not entitled to a jury instruction that the present value of future losses must as a matter of law be computed at the State's 6 percent legal interest rate. The state trial court had properly refused to give an instruction that "sought to subject the jury's estimate to [such a] rigid mathematical limitatio[n]." *Id.*, at 528.[10]

There is nothing in *Pfeifer* to suggest that the judge rather than the jury is to determine the discount rate in FELA actions. There, we repeatedly indicated that the present value calculation is to be made by the "trier of fact." See 462 U. S., at 534, 536, 538, 547–548, 550–551, n. 32. Of course, because *Pfeifer* was tried to the bench, the "trier of fact" in that case was a judge rather than a jury.

We do not mean to suggest that the judge in an FELA action is foreclosed from assisting the jury in its present value calculations. Indeed, because "'[t]he average accident trial should not be converted into a graduate seminar on economic forecasting,'" *id.*, at 548 (quoting *Doca* v. *Marina Mercante Nicaraguense, S. A.*, 634 F. 2d 30, 39 (CA2 1980)), the judge has an obligation to prevent the trial proceedings on the present value issue from becoming unnecessarily prolonged and the jury from becoming hopelessly mired in "difficult mathematical computation." It is therefore permissible for the judge to recommend to the jury one or more methods of calculating present value so long as the judge does not in effect pre-empt the jury's function.[11] A trial judge's instructions to the jury with regard to discount methods—provided that they do not "subject the jury's estimate to . . . rigid mathematical limitatio[n]," *Holloway*, *supra*, at 528—are entitled to substantial deference on appellate review.

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[10] A similar issue was presented in *Vicksburg & Meridian R. Co.* v. *Putnam*, 118 U. S. 545 (1886), a tort action brought against a railroad by an injured passenger. The trial judge had instructed the jury to calculate the present value of the plaintiff's damages at the rate shown in standard annuity tables. This Court held that such an instruction "tended to mislead the jury . . . by giving them to understand that the tables were not merely competent evidence of the average duration of human life, and of the present value of life annuities, but furnished absolute rules which the law required them to apply in estimating the probable duration of the plaintiff's life, and the extent of the injury which he had suffered." *Id.*, at 557. The Court observed that "it has never been held that the rules to be derived from such tables or computations must be the absolute guides of the judgment and the conscience of the jury." *Id.*, at 554. The Court discussed this aspect of the *Putnam* decision in *Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U. S. 485 (1916), without questioning its continued validity or intimating that a different rule might apply in FELA actions. See *id.*, at 491–492.

In the present case, however, the trial judge instructed the jury that a zero discount rate was to be applied as a matter of law to appellee's future damages. This instruction improperly took from the jury the essentially factual question of the appropriate rate at which to discount appellee's FELA award to present value, and therefore requires reversal.

IV

We conclude that Pennsylvania's prejudgment interest and "total offset" rules were improperly applied to this FELA action. The judgment of the Pennsylvania Supreme Court is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I agree with the Court's conclusion that the availability of prejudgment interest in a suit under the Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, 45 U. S. C. §51 *et seq.*, is governed by federal law, and that the state trial court therefore was not at liberty to supplement appellee's judgment on the basis of Rule 238 of the Pennsylvania

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[11] Moreover, as we recognized in *Pfeifer*, "nothing prevents parties interested in keeping litigation costs under control from stipulating to [the 'total offset' method's] use before trial." 462 U. S., at 550.

Rules of Civil Procedure. I also agree with the Court's conclusion that the trial court erred in refusing to instruct the jury on present value pursuant to federal law. Accordingly, I join Parts I, II–A, and III of the Court's opinion. Because the Court's hasty decision that prejudgment interest is uniformly unavailable in FELA actions fails to follow the teaching of our prior cases and undermines the FELA's system of compensation, I dissent from Part II–B.

I

Section 1 of the FELA, 45 U. S. C. § 51, provides that a railroad "shall be liable in damages to any [employee] suffering injury . . . from the negligence" of the railroad or its employees. Enacted to ensure compensation for railroad workers injured by the negligence of their employers or of their fellow employees, the FELA uses broad language that, in turn, "has been construed even more broadly" by this Court, consistent with its assessment of congressional intent. *Atchison, T. & S. F. R. Co.* v. *Buell*, 480 U. S. 557, 561–562 (1987); see *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 432 (1958). This Court has "accepted [a] standard of liberal construction in order to accomplish" the "Act's humanitarian purposes." *Urie* v. *Thompson*, 337 U. S. 163, 180 (1949); *Atchison, T. & S. F. R. Co.* v. *Buell, supra*, at 562. In accord with these principles, appellee is entitled under the FELA to interest on the money awarded to him as damages for his economic losses, here lost earnings, between the time of his injury and the time of trial.[1]

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[1] At the trial of this action, appellee sought recovery for, and the trial court instructed the jury on, four distinct elements of "damages" within the meaning of § 1 of the FELA: (i) appellee's lost earnings from the time of his injury to the time of trial, (ii) appellee's pain and suffering from the time of his injury to the time of trial, (iii) appellee's future pain and suffering, and (iv) appellee's future lost earnings. Tr. in GD 79–23765, Ct. Common Pleas, Allegheny Cty., pp. 694–695. Although the jury returned a single lump-sum verdict for appellee, a properly instructed jury could have returned a verdict that segregated past economic damages from noneconomic

A

Although the FELA allows recovery of "damages," it does not specifically state that "damages" includes interest. Nonetheless, "in the absence of an unequivocal prohibition of interest . . . , this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in the light of general principles deemed relevant by the Court." *Rodgers* v. *United States*, 332 U. S. 371, 373 (1947). Plainly, the "congressional purpose" in providing a damages award under the FELA was to compensate a worker for his injury. Nothing in the legislative history or in our decisions suggests that this compensation was intended to be anything less than what was required to compensate him fully. The relevant "general principle" employed by this Court in interpreting the FELA is the provision of liberal recovery under flexible remedies. See *Kernan* v. *American Dredging Co.*, 355 U. S., at 432 ("[I]t is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers"). Together, purpose and principle indicate the allowance of interest in FELA cases.

To compensate an injured rail employee fully for income lost prior to trial, it is necessary to award not only the amount of the lost income, but also interest on that income for the time the employee did not have the use of it. "The interest foregone on lost income or on money spent for out-of-pocket expenses from the date of loss to the time of compensation is as much a part of making an injured party whole as is the calculation of her wage rate." *Wilson* v. *Burlington Northern R. Co.*, 803 F. 2d 563, 566 (CA10 1986) (concurring

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and future economic damages. In my view, the statute sanctions the award of prejudgment interest on only the first of these categories.

opinion), cert. denied, 480 U. S. 946 (1987). In recognition of the principle that an interest award may be necessary to provide full compensation, this Court, in other contexts, repeatedly has authorized prejudgment interest for economic injury when the purpose of the overall award is to make the plaintiff whole. See *General Motors Corp.* v. *Devex Corp.*, 461 U. S. 648, 654–656 (1983) (patent infringement); *Jacobs* v. *United States*, 290 U. S. 13, 16–17 (1933) (eminent domain); *Waite* v. *United States*, 282 U. S. 508, 509 (1931) (patent infringement); *Miller* v. *Robertson*, 266 U. S. 243, 256–259 (1924) (contract). In short, it cannot be denied that an award of interest on pretrial economic losses in an FELA case is necessary to make the injured worker whole, and that making the worker whole is the purpose of the FELA.[2] It would seem apparent, therefore, that, under our normal method of deciding such questions, a prejudgment interest award is appropriate in an FELA case.

B

In reaching the opposite conclusion, the Court relies principally on a common-law rule that barred prejudgment interest in suits for personal injury or wrongful death. *Ante*, at 337–338.[3] From the combination of this common-law rule and the FELA's silence on interest, the Court would discern a congressional intent to disallow interest awards entirely in FELA cases—an intent, in effect, to deny full compensation to workers covered by the FELA.[4] Closer scrutiny of the development of interest and damages law, however, reveals the flaws in this facile analysis.

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[2] Of course, in not making the injured worker whole, a rule denying prejudgment interest provides a windfall to the defendant. It also creates an incentive for the employer to stall the litigation and postpone the judgment as long as possible. See *General Motors Corp.* v. *Devex Corp.*, 461 U. S. 648, 656, n. 10 (1983). It seems unlikely that Congress intended such results to be part of its program of "liberal recovery" for workers.

[3] The Court also relies on "Congress' failure to disturb a consistent judicial interpretation" of the FELA denying prejudgment interest. *Ante*, at 338–339. However, "the doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions. . . . We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation." *Jones* v. *Liberty Glass Co.*, 332 U. S. 524, 533–534 (1947). See also *Helvering* v. *Reynolds*, 313 U. S. 428, 432 (1941). Moreover, the "consistent judicial interpretation" relied on here is particularly unpersuasive. "Few of the

The common law's hostility to interest awards usually is traced to the medieval view of interest as an evil thing. See D. Dobbs, Law of Remedies § 3.5, p. 165 (1973); C. McCormick, Law of Damages § 51 (1935). Before the time of Henry VIII, English common law prohibited the payment of interest even for the lending of money. 1 T. Sedgwick, Measure of Damages § 283 (9th ed. 1912). The abhorrence of all forms of interest gradually receded, so that, by the time of the FELA's enactment, it was "almost universally held in this country that interest is in the proper case given as damages by the common law." § 293; 1 T. Sedgwick, Measure of

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cases contain any extensive discussion of the subject . . . and . . . many of the recent cases simply note that the issue was settled in an older case that disposed of the point summarily." *Poleto* v. *Consolidated Rail Corporation*, 826 F. 2d 1270, 1278 (CA3 1987). Indeed, a number of the most recent opinions have recognized the "excellent case" to be made for prejudgment interest under the FELA. *Ibid.* See also *Wilson* v. *Burlington Northern R. Co.*, 803 F. 2d 563, 566–568 (CA10 1986) (concurring opinion), cert. denied, 480 U. S. 946 (1987); *Garcia* v. *Burlington Northern R. Co.*, 597 F. Supp. 1304 (Colo. 1984), rev'd on other grounds, 818 F. 2d 713 (CA10 1987). Finally, of course, cases of this Court, by consistently giving the FELA a broad and flexible construction, have signaled the opposite result. See, *e. g.*, *Kernan* v. *American Dredging Co.*, 355 U. S. 426 (1958); *Jamison* v. *Encarnacion*, 281 U. S. 635 (1930).

[4] I do not understand the Court to argue that the absence of any express reference to interest in the FELA is, by itself, probative. Certainly, such a contention could not succeed. First, as explained above, that approach is directly contrary to this Court's settled technique for deciding questions of the availability of interest in the face of congressional silence. Second, the FELA's express authorization of the recovery of "damages" may be read as providing for prejudgment interest. Indeed, as the Court properly recognizes: "Prejudgment interest . . . is part of the actual *damages* sought to be recovered." *Ante*, at 335 (emphasis added).

Damages § 293 (8th ed. 1891). Thus, to an authority writing in 1891, 17 years before the passage of the FELA, "[t]he gradual extension of the principles allowing interest as damages [was] clear." § 297.

To be sure, claims for interest often were summarily dismissed in personal injury and wrongful-death suits. See McCormick § 56, p. 224. It was, nonetheless, "the prevailing view [that] interest may be allowed in all actions of tort where the loss is pecuniary," 1 T. Sedgwick, Measure of Damages § 316, p. 630 (9th ed. 1912), and, even prior to the FELA, interest sometimes was allowed on economic losses that had resulted from personal injury. See *Washington & Georgetown R. Co.* v. *Hickey*, 12 App. D. C. 269, 275–276 (1898); *Georgia R. & Banking Co.* v. *Garr*, 57 Ga. 277, 280 (1876); see also *Ell* v. *Northern Pacific R. Co.*, 1 N. D. 336, 353, 48 N. W. 222, 227 (1891) (pursuant to statute). However, because claims for lost earnings in personal injury suits frequently were joined with claims for noneconomic injury, such as pain and suffering, interest usually was not awarded. McCormick § 56, p. 224. Thus, the generalization about the unavailability of interest was criticized by Professor McCormick as "hasty and injudicious": "It seems clearly desirable that the jury should at least be permitted, if not required, to add interest as compensation for delay in payment of those purely pecuniary losses which result from an injury to the person." *Ibid.*

Against this background, one might conclude that, in mandating that railroads "shall be liable in damages," Congress actually intended not to provide a blanket award of prejudgment interest on personal injury and wrongful-death awards under the FELA. Certainly, many FELA remedies, such as recovery for past pain and suffering and for future damages, are widely viewed in the context of personal injury litigation as inappropriate objects for an interest award even today. See, *e. g.*, *Poleto* v. *Consolidated Rail Corporation*, 826 F. 2d 1270, 1278, n. 14 (CA3 1987); Comment, Prejudgment Interest: An Element of Damages Not To Be Overlooked, 8 Cumberland L. Rev. 521, 536–537 (1977). This is so because interest on these elements of damages is not necessary to full compensation.[5] It should not be concluded, however, that Congress intended to deny interest on past economic losses, such as the lost wages that are a part of the recovery appellee seeks here. Therefore, the Court's departure from our normal inquiry into the relation between an allowance of interest and Congress' purpose in creating an obligation, and the Court's indifference to the policy of liberal recovery under the FELA, are without justification.

C

The Court's conclusion about the unavailability of interest in FELA actions is particularly curious coming, as it does, in a case which also involves the method of discounting an award of future damages to present value. Awarding prejudgment interest and discounting to present value are really two sides of the same coin. For precisely the same reason that "'a given sum of money in hand is worth more than the like sum of money payable in the future,'" *ante*, at 339, quoting *Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U. S. 485, 489 (1916), a given sum of money in hand is worth less than the like sum of money had it been paid in the past. It is hard to see how the Court can recognize that the meaning of "damages" under the FELA requires that future lost earnings be discounted to present value, but fail to recognize that the same term encompasses a mandate that past lost earnings be increased to present value, through the use of prejudgment interest. In effect, the Court thus only half-recognizes the principle that an FELA plaintiff is entitled to recover "'the damages . . . [that] flow from the deprivation of . . . pecuniary benefits.'" *Norfolk & Western R. Co.* v. *Liepelt*, 444 U. S. 490, 493 (1980), quoting *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 59, 70 (1913).

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[5] Arguably, damages for pain and suffering are themselves not truly compensatory. See D. Dobbs, Law of Remedies § 8.1, pp. 548–550 (1973). Certainly, such awards are of a different character. They are inherently noneconomic and are established through the subjective discretion of the jury. *Poleto* v. *Consolidated Rail Corporation*, 826 F. 2d, at 1278, n. 14. Prejudgment interest on these speculative awards does not make up for the lost use of money and cannot be considered compensatory in any realistic sense.

Indeed, in previous discussions of present-value calculations, we have recognized the symmetry between discounting to present value and awarding prejudgment interest. In *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U. S. 523, 538, n. 22 (1983), the Court instructed:

> "It is . . . more precise to discount the entire lost stream of earnings back to the date of injury—the moment from which earning capacity was impaired. The plaintiff may then be awarded interest on that discounted sum for the period between injury and judgment, in order to ensure that the award when invested will still be able to replicate the lost stream."[6]

This Court has held that the present-value principles of *Pfeifer* apply in FELA actions. See *St. Louis Southwestern R. Co.* v. *Dickerson*, 470 U. S. 409, 411–412 (1985) *(per curiam).*

II

In sum, I conclude that prejudgment interest on past economic loss is available as part of the damages award in FELA cases. This reading of the statute comports with the congressional intent to provide liberal recovery under the FELA. Of course, by applying Rule 238 of the Pennsylvania Rules of Civil Procedure, the state trial court went further and allowed prejudgment interest on appellee's general verdict, including interest on appellee's damages for pain and suffering and future losses, which are not appropriate objects for a compensatory award of prejudgment interest. Because the trial court erred in its instruction on present value, however, *ante*, at 339–342, a new trial on damages will be necessary in any event. As part of appellee's award at his new trial, I would allow interest on the past economic damages he has proved.

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[6] *In re Air Crash Disaster Near Chicago, Illinois, on May 25, 1979*, 644 F. 2d 633 (CA7 1981), on which the Court in *Pfeifer* relied, stated the necessary relation between interest awards and discounting to present value even more plainly:

"[Even when] prejudgment interest [is rejected] as a separate element of damages, the measure of compensatory damages in wrongful death cases unquestionably does involve some form of interest in the determination of 'present value.' Prejudgment interest *per se* is not allowable [under Illinois law] as a separate element of a wrongful death damages award, but use of interest is implicit in the calculation of the present value of plaintiff's pecuniary loss as of the date of trial." 644 F. 2d, at 641.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

For the reasons given by the Court, I agree that prejudgment interest was impermissibly awarded in this FELA case. Accordingly, I join Parts I and II of its opinion. Because the trial court erroneously gave conclusive effect to a state rule requiring the use of a "total offset" method of calculating present value, I also agree that we must reverse the judgment of the Supreme Court of Pennsylvania upholding that decision. I do not agree, however, that juries must in all circumstances be left free to choose among the total offset rule and alternative methods of accounting for anticipated future inflation.

The majority correctly notes that damages awards in state-court FELA cases must be based on an approximation of present value, and that the jury must be instructed accordingly. *Ante*, at 339–340. "Although . . . [it is] clear that no single method for determining present value is mandated by federal law and that the method of calculating present value should take into account inflation and other sources of wage increases as well as the rate of interest, it is equally clear that an utter failure to instruct the jury that present value is the proper measure of a damages award is error." *St. Louis*

Southwestern R. Co. v. *Dickerson,* 470 U. S. 409, 412 (1985). The reason for this rule is plain: because of the time value of money and the practice of awarding damages in a lump sum, the failure to reduce awards for loss of future wages to their present value would risk the systematic overcompensation of plaintiffs. *Ibid.*

For reasons that were explained in great detail in this Court's opinion in *Jones & Laughlin Steel Corp.* v. *Pfeifer,* 462 U. S. 523 (1983), the best method for calculating the approximate present value of an award for loss of future earnings could become the subject of reasonable debate in almost any case. Some of the uncertainties arise from the phenomenon of price inflation in our economy, and others arise from the possibility of "productivity gains" that would have increased a particular plaintiff's real wages over time. Absent congressional action, *Pfeifer* cautiously declined to impose any one method of accounting for these phenomena on all litigants and all cases. Instead, the Court concluded that in federal bench trials, the judge should be permitted to choose among reasonable methods and should explain the choice. *Id.,* at 548–549, 552–553.

The trial judge in this case believed that the choice among methods of calculating present value was a procedural issue, and she "blindly applied the total offset method [of] *Kaczkowski* v. *Bolubasz,* 491 Pa. 561, 421 A. 2d 1027 (1980)." 513 Pa. 86, 100, 518 A. 2d 1171, 1178 (1986) (dissenting opinion below); see also Tr. 577–578. The Supreme Court of Pennsylvania concluded that use of the total offset method was appropriate here because that method had been "deliberately selected [in *Kaczkowski*] as the rule that most nearly provides an injured claimant with damages to the full extent of the injuries sustained." 513 Pa., at 92–93, 518 A. 2d, at 1174. Whatever might be said in favor of precluding individual trial courts and juries from reexamining such a rule, we specifically held in *Pfeifer* that it was improper for a federal trial court to apply the *Kaczkowski* rule without examining its suitability in the particular case before the court. See 462 U. S., at 546, 551–553. The reason for this holding was a reluctance "to select [any] of the many rules [for calculating present value] that have been proposed and establish it for all time as the exclusive method in all federal trials for calculating an award for lost earnings in an inflationary economy." *Id.*, at 546. State appellate courts are in no better position than this Court to select a single rule for all cases and all time. The reasoning in *Pfeifer* therefore precludes the automatic application of any method of estimating present value in an FELA case. Although I therefore agree with the Court that the judgment below must be reversed, I do not believe that a jury charge reflecting the *Kaczkowski* rule would necessarily have been impermissible in this case.

Believing that the choice of a method for estimating present value is always an "essentially factual question," the majority will permit the trial judge to "recommend to the jury one or more methods" but will not permit the judge to impose "'rigid mathematical limitation[s].'" *Ante*, at 341–342. As with many mixed questions of law and fact, one can imagine cases in which the choice between competing methods of calculating present value would turn on disputed factual questions. In such cases, I agree, it would be error to take those questions from the jury. If, for example, the parties offered conflicting evidence as to foreseeable wage increases, attributable to promotions for which the plaintiff would have been eligible but for the injury that gave rise to the case, a court could not properly impose on the jury a rule under which the market interest rate is deemed equal to price inflation plus all other sources of future wage increases. Cf. *Pfeifer*, *supra*, at 544–545 (discussing *Beaulieu* v. *Elliott*, 434 P. 2d 665 (Alaska 1967)). The case before us, however, raises no such possibility.

In this case, the trial judge applied the rule set out in *Kaczkowski*, v. *Bolubasz*, 491 Pa. 561, 579–583, 421 A. 2d 1027, 1036–1039 (1980), under which the rates of future price inflation are presumed equal to the available interest rates. See 513 Pa., at 94–95, 518 A. 2d, at 1175. (Under *Kaczkowski*, it should be noted, the jury rather than the judge estimates the effects of lost "productivity gains," which depend largely on factors that are specific to the plaintiff and the industry in which the plaintiff worked. See 491 Pa., at 579–580, 421 A. 2d, at 1036–1037.) The relation between future price inflation and interest rates has virtually nothing to do with any particular plaintiff or with the facts of any individual case. The absence of such a connection is illustrated by the present case, in which there is no suggestion that appellant offered any expert testimony or other evidence about future levels of price inflation and interest rates. See Brief for Appellant 34.

Appellant's proposed jury instruction, moreover, made no mention of inflation, and thus appears on its face to have been potentially far more misleading than the *Kaczkowski*-type instruction actually given. Compare App. 68a–69a with Tr. 701–702. The majority does not say, and I do not think one could properly say, that the trial judge erred by refusing to give appellant's proposed jury instruction. Nor, as this Court's *Pfeifer* opinion amply demonstrates, is the prediction of future inflation and interest rates a matter that can properly be referred to common experience or common sense. The majority nonetheless concludes that the jury in this case should have been left free to choose between a reasonable rule like the one adopted in *Kaczkowski* and such other methods as may have occurred to the jurors. I cannot agree that federal law requires a trial judge to permit the jury to speculate about something so uncertain and so disconnected from any evidence in the case at hand.

The majority suggests that its decision to the contrary is supported by *Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U. S. 485 (1916), and *Louisville & Nashville R. Co.* v. *Holloway*, 246 U. S. 525 (1918). The majority does not, and I believe could not, say that the result reached today is compelled by those decisions. *Kelly* held only that it is error for a court to take no steps to ensure that an FELA award is reduced to its approximate present value. Although the Court assumed that juries would calculate the reduction, it did not say or imply that the choice of a method for making that calculation must always be left entirely to the jury. Similarly, *Holloway* held that a party was not entitled to a jury instruction requiring that an award be discounted by the legal rate of interest in effect at that time. Choosing the legal rate of interest as the discount rate in an FELA action would be arbitrary because there is no reason to suppose that it takes account of inflation or of the reasonable investment opportunities actually available to a prevailing plaintiff. See generally *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U. S., at 537–539. As *Pfeifer* indicates, however, the "total offset" rule at issue in this case is not arbitrary and would not constitute reversible error if employed by a judge in a bench trial, even if the parties had not introduced evidence to support it. See *id.*, at 546–547, 551–553. Thus, although *Holloway* rejected a party's claim that it was entitled to a particular "rigid mathematical limitatio[n]" on a jury's discretion, it did not say or imply that a judge may never impose any such limitation. Compare *Holloway*, *supra*, at 528, with *ante*, at 340–341.

Although it was error to apply *Kaczkowski* automatically in this case, I see no reason to prohibit the trial court in an FELA case from employing a rebuttable presumption in favor of the *Kaczkowski* rule. That rule is reasonable, and we indicated in *Pfeifer* that it could be used in a bench trial so long as the judge chose it deliberately. 462 U. S., at 551–553. Unless one of the parties shows by evidence or argument that some other rule or method of estimating present value may be more appropriate, I simply see no basis for turning a jury loose to speculate about the complex and technical matters that underlie any method of estimating present value.*

In the case before us, appellant offered a jury instruction on the calculation of present value that was inconsistent with *Kaczkowski.* App. 68a–69a. It has not been suggested, however, that appellant offered evidence to show that present value could be estimated more accurately by some method other than the one adopted in *Kaczkowski;* nor is there any suggestion that appellant was denied an opportunity to present such evidence. See Tr. 577; Brief for Appellant 34. Assuming that the record would not support such suggestions (a question that I would leave for the Supreme Court of Pennsylvania to address on remand), I would require only that the trial judge make a "deliberate choice" between the *Kaczkowski* rule and others that may be suggested. See *Pfeifer, supra,* at 552–553. If a reasonable choice were made in favor of the *Kaczkowski* rule, I would permit the jury's verdict to be reinstated.

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*Despite the majority's suggestion to the contrary, *ante,* at 341, *Pfeifer* did not imply that the choice between the *Kaczkowski* rule and some competing method is necessarily a jury question. First, the decision in *Pfeifer* dealt with cases arising under the Longshoremen's and Harbor Workers' Compensation Act, where the trier of fact is a federal judge. 462 U. S., at 547. For that reason, we had no occasion in *Pfeifer* to decide which of the many questions that may arise in the calculation of present value may be resolved by the judge in a jury case. Second, the *Pfeifer* opinion did not consistently say that the method of calculating present value must be chosen by the "trier of fact." See, *e. g., id.,* at 548–549 ("[W]e do not believe a trial court adopting [a 'real interest rate'] approach . . . should be reversed if it adopts a rate between 1 and 3% and explains its choice"). Third, *Pfeifer*'s expressed expectation that a trial court would explain its choice of a particular discount rate suggests that the decision is not always an "essentially factual question." See *ante,* at 342. Judges are not ordinarily expected to give explanations for their findings of fact, and juries ordinarily do not give explanations at all.

MAYNARD, WARDEN, ET AL. *v.* CARTWRIGHT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 87-519. Argued April 19, 1988—Decided June 6, 1988

Respondent, a disgruntled ex-employee of a married couple, entered the couple's home, shot the wife twice with a shotgun, shot and killed the husband, and then slit the wife's throat and stabbed her twice. Respondent was tried in an Oklahoma court and found guilty of the first-degree murder of the husband. The jury imposed the death penalty upon finding that two statutory aggravating circumstances, including the circumstance that the murder was "especially heinous, atrocious, or cruel," had been established, and that these circumstances outweighed the mitigating evidence. The Oklahoma Court of Criminal Appeals affirmed on direct appeal, and later affirmed a denial of state collateral relief. The Federal District Court then denied respondent's habeas corpus petition, but the Court of Appeals reversed, holding that the statutory words "heinous," "atrocious," and "cruel" do not on their face offer sufficient guidance to the jury to escape the strictures of *Furman* v. *Georgia*, 408 U. S. 238. The court also ruled that the Oklahoma courts had not adopted a limiting construction that cured the infirmity, concluding that the construction utilized by the state appellate court, which simply declared that the facts of the case were so plainly "especially heinous, atrocious, or cruel" that the death penalty was warranted, was itself unconstitutionally vague under the Eighth Amendment to the Federal Constitution. The court therefore enjoined the execution of the death sentence, but without prejudice to further state proceedings for redetermination of the sentence.

Held: As applied in this case, the statutory aggravating circumstance was unconstitutionally vague. Pp. 360-366.

(a) The State's contention that factual circumstances may, in themselves, plainly characterize the killing as "especially heinous, atrocious, or cruel" represents an improper, Due Process Clause approach to vagueness that fails to recognize the rationale of this Court's Eighth Amendment cases. Under *Furman, supra,* and its progeny, the proper analysis of a vagueness claim focuses on whether the challenged aggravating circumstance adequately informs the jury as to what it must find in order to impose the death penalty, or whether it leaves the jury with unchanneled discretion to make an arbitrary and capricious decision. *Godfrey* v. *Georgia*, 446 U. S. 420, which applied that analysis, controls this case. The language of the Oklahoma provision gave no more guidance to the jury here than did the "outrageously or wantonly vile, horrible, or inhuman" language that was held unconstitutional in *Godfrey*. Moreover, Oklahoma's addition of the word "especially" no more limited the overbreadth of the aggravating factor than did the addition of "outrageously or wantonly" to the word "vile" in the language considered in *Godfrey*. Furthermore, the state appellate court's factual approach to construction was indistinguishable from the action of the Georgia court in *Godfrey*, which failed to cure the jury's unfettered discretion and to satisfy the Eighth Amendment. Pp. 360–364.

(b) The State's complaint that the Court of Appeals erroneously ruled that torture or serious physical abuse is the only constitutionally acceptable limiting construction of the aggravating circumstance is unfounded, since, although the court noted cases in which such a requirement was held to be curative, it expressly refrained from directing the State to adopt any particular construction. The contention that the death penalty should stand because the jury found another, unchallenged aggravating circumstance sufficient to sustain the sentence is also unpersuasive, since, when this case was decided, Oklahoma had no procedure for attempting to save a death penalty when one of several aggravating circumstances found by the jury was held to be invalid or unsupported by evidence, but simply vacated the death sentence and automatically imposed a life-imprisonment sentence. The significance for this case of the state appellate court's decisions, which were issued after the Court of Appeals' decision below, to adopt a torture-or-serious-physical-abuse limiting construction of the aggravating circumstance, and to no longer automatically set aside a death penalty where one of several aggravating circumstances is invalid or inapplicable, must be decided in the first instance by the Oklahoma courts in any further proceedings for redetermination of the appropriate sentence. Pp. 364–366.

822 F. 2d 1477, affirmed.

WHITE, J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 366.

Susan Stewart Dickerson, Assistant Attorney General of Oklahoma, argued the cause for petitioners. With her on the briefs were *Robert H. Henry*, Attorney General, and *David W. Lee*, *M. Caroline Emerson*, and *Sandra D. Howard*, Assistant Attorneys General.

Mandy Welch by appointment of the Court, 484 U. S. 1056, argued the cause and filed briefs for respondent.*

JUSTICE WHITE delivered the opinion of the Court.

On May 4, 1982, after eating their evening meal in their Muskogee County, Oklahoma, home, Hugh and Charma Riddle watched television in their living room. At some point, Mrs. Riddle left the living room and was proceeding towards the bathroom when she encountered respondent Cartwright standing in the hall holding a shotgun. She struggled for the gun and was shot twice in the legs. The man, whom she recognized as a disgruntled ex-employee, then proceeded to the living room where he shot and killed Hugh Riddle. Mrs. Riddle dragged herself down the hall to a bedroom where she tried to use a telephone. Respondent, however, entered the bedroom, slit Mrs. Riddle's throat, stabbed her twice with a hunting knife the Riddles had given him for Christmas, and then left the house. Mrs. Riddle survived and called the police. Respondent was arrested two days later and charged with first-degree murder.

Respondent was tried and found guilty as charged. The State, relying on three statutory aggravating circumstances, sought the death penalty. The jury found two of them to have been established: first, the defendant "knowingly cre-

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*A brief of *amici curiae* urging reversal was filed for the State of Alabama et al. by *Don Siegelman*, Attorney General of Alabama, and *Ed Carnes*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Robert K. Corbin* of Arizona, *Duane Woodard* of Colorado, *James T. Jones* of Idaho, *William J. Guste, Jr.*, of Louisiana, *Michael C. Moore* of Mississippi, *William L. Webster* of Missouri, *Brian McKay* of Nevada, *Stephen E. Merrill* of New Hampshire, *Lacy H. Thornburg* of North Carolina, *Roger A. Tellinghuisen* of South Dakota, *W. J. Michael Cody* of Tennessee, *David L. Wilkinson* of Utah, *Mary Sue Terry* of Virginia, and *Joseph B. Meyer* of Wyoming.

Kenneth Stuart Gallant filed a brief for Roger Dale Hayes as *amicus curiae* urging affirmance.

Richard C. Neuhoff filed a brief for the California Appellate Project as *amicus curiae*.

ated a great risk of death to more than one person"; second, the murder was "especially heinous, atrocious, or cruel." Okla. Stat., Tit. 21, §§ 701.12(2) and (4) (1981). Finding that the aggravating circumstances outweighed the mitigating evidence, the jury imposed the death penalty. The Oklahoma Court of Criminal Appeals affirmed on direct appeal, *Cartwright* v. *State*, 695 P. 2d 548, cert. denied, 473 U. S. 911 (1985), and later affirmed a denial of state collateral relief. *Cartwright* v. *State*, 708 P. 2d 592 (1985), cert. denied, 474 U. S. 1073 (1986). Respondent then sought federal habeas corpus on several grounds. The District Court rejected each of them, including the claim that the death sentence was invalid because it rested wholly or in part on an unconstitutional aggravating circumstance, namely, the unconstitutionally vague and overbroad aggravating circumstance that the murder was "especially heinous, atrocious, or cruel." A panel of the Court of Appeals for the Tenth Circuit affirmed, 802 F. 2d 1203 (1986), but rehearing en banc was granted limited to the claim concerning the challenged aggravating circumstance.

The en banc court recognized that the jury had found two aggravating circumstances, one of them being unchallenged. But it noted that in cases where a death sentence rested in part on an invalid aggravating circumstance, the Oklahoma courts did not reweigh the aggravating and mitigating circumstances in an effort to save the death penalty; rather, the death sentence was vacated and a life-imprisonment sentence automatically imposed. Oklahoma had "no provision for curing on appeal a sentencer's consideration of an invalid aggravating circumstance." 822 F. 2d 1477, 1482 (1987). It was therefore necessary to consider the vagueness challenge to one of the aggravating circumstances. The court proceeded to do so and unanimously sustained the challenge. It stated that the words "heinous," "atrocious," and "cruel" did not on their face offer sufficient guidance to the jury to escape the strictures of our judgment in *Furman* v. *Georgia*, 408 U. S. 238 (1972). Nor, in the court's view, had the Oklahoma courts adopted a limiting construction that cured the infirmity and that was relied upon to affirm the death sentence in this case. It concluded that the Oklahoma Court of Criminal Appeals' construction of the aggravating circumstance was "unconstitutionally vague" under the Eighth Amendment. 822 F. 2d, at 1483, 1492. The death sentence, accordingly, was held to be invalid and its execution enjoined, but "without prejudice to further proceedings by the state for redetermination of the sentence on the conviction." *Id.*, at 1492.

Petitioner sought review here of the Tenth Circuit's holding that the aggravating circumstance was unconstitutionally vague. Because of the conflict between the Court of Appeals for the Tenth Circuit and the Court of Criminal Appeals of Oklahoma and because of the importance of this constitutional issue to the orderly and proper administration of state death-penalty statutes, we granted certiorari, limited to that issue. 484 U. S. 1003 (1988). We affirm the judgment of the Court of Appeals.

The Court of Appeals, with some care, reviewed the evolution in the interpretation of the "especially heinous, atrocious, or cruel" aggravating circumstance by the Oklahoma Court of Criminal Appeals up to and including its decision in this case. Its reading of the cases was that while the Oklahoma court had considered the attitude of the killer, the manner of the killing, and the suffering of the victim to be relevant and sufficient to support the aggravating circumstance, that court had "refused to hold that any one of those factors *must* be present for a murder to satisfy this aggravating circumstance." 822 F. 2d, at 1491. Rather, the Oklahoma court simply had reviewed all of the circumstances of the murder and decided whether the facts made out the aggravating circumstance. *Ibid.* We normally defer to courts of appeals in their interpretation of state law, and we see no reason not to accept the Court of Appeals' statements about state law in this case, especially since the State does not challenge this reading of the Oklahoma cases.

The State, however, takes issue with the Court of Appeals' conclusion that this approach, which was also employed in this case, to interpreting and applying the challenged aggravating circumstance is unconstitutional. It insists that in some cases there are factual circumstances that so plainly characterize the killing as "especially heinous, atrocious, or cruel" that affirmance of the death penalty is proper. As we understand the argument, it is that a statutory provision governing a criminal case is unconstitutionally vague only if there are no circumstances that could be said with reasonable certainty to fall within reach of the language at issue. Or to put it another way, that if there are circumstances that any reasonable person would recognize as covered by the statute, it is not unconstitutionally vague even if the language would fail to give adequate notice that it covered other circumstances as well.

The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. *United States* v. *Powell*, 423 U. S. 87, 92–93 (1975); *United States* v. *Mazurie*, 419 U. S. 544, 550 (1975); *Palmer* v. *City of Euclid*, 402 U. S. 544 (1971) *(per curiam); United States* v. *National Dairy Corp.*, 372 U. S. 29, 32–33, 36 (1963). Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman* v. *Georgia*, 408 U. S. 238 (1972).

Furman held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that did not. *E. g., id.*, at 310 (Stewart, J., concurring); *id.*, at 311 (WHITE, J., concurring). Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action. *Gregg* v. *Georgia*, 428 U. S. 153, 189, 206–207 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.); *id.*, at 220–222 (WHITE, J., concurring in judgment); *Spaziano* v. *Florida*, 468 U. S. 447, 462 (1984); *Lowenfield* v. *Phelps*, 484 U. S. 231, 244 (1988).

Godfrey v. *Georgia*, 446 U. S. 420 (1980), which is very relevant here, applied this central tenet of Eighth Amendment law. The aggravating circumstance at issue there permitted a person to be sentenced to death if the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Id.*, at 422. The jury had been instructed in the words of the statute, but its verdict recited only that the murder was "outrageously or wantonly vile, horrible or inhuman." The Supreme Court of Georgia, in affirming the death sentence, held only that the language used by the jury was "not objectionable" and that the evidence supported the finding of the presence of the aggravating circumstance, thus failing to rule whether, on the facts, the offense involved torture or an aggravated battery to the victim. *Id.*, at 426–427. Although the Georgia Supreme Court in other cases had spoken in terms of the presence or absence of these factors, it did not do so in the decision under review, and this Court held that such an application of the aggravating circumstance was unconstitutional, saying:

> "In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of [the aggravating circumstance's] terms. In fact, the jury's interpretation of [that circumstance] can only be the subject of sheer speculation." *Id.*, at 428–429 (footnote omitted).

The affirmance of the death sentence by the Georgia Supreme Court was held to be insufficient to cure the jury's unchanneled discretion because that court failed to apply its previously recognized limiting construction of the aggravating circumstance. *Id.*, at 429, 432. This Court concluded that, as a result of the vague construction applied, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.*, at 433. Cf. *Proffitt* v. *Florida*, 428 U. S. 242, 254–256 (1976). It plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty.

We think the Court of Appeals was quite right in holding that *Godfrey* controls this case. First, the language of the Oklahoma aggravating circumstance at issue—"especially heinous, atrocious, or cruel"—gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in *Godfrey*. The State's contention that the addition of the word "especially" somehow guides the jury's discretion, even if the term "heinous" does not, is untenable. To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous." *Godfrey*, *supra*, at 428–429. Likewise, in *Godfrey* the addition of "outrageously or wantonly" to the term "vile" did not limit the overbreadth of the aggravating factor.

Second, the conclusion of the Oklahoma court that the events recited by it "adequately supported the jury's finding" was indistinguishable from the action of the Georgia court in *Godfrey*, which failed to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment. The Oklahoma court relied on the facts that Cartwright had a motive of getting even with the victims, that he lay in wait for them, that the murder victim heard the blast that wounded his wife, that he again brutally attacked the surviving wife, that he attempted to conceal his deeds, and that he attempted to steal the victims' belongings. 695 P. 2d, at 554. Its conclusion that on these facts the jury's verdict that the murder was especially heinous, atrocious, or cruel was supportable did not cure the constitutional infirmity of the aggravating circumstance.

The State complains, however, that the Court of Appeals ruled that to be valid the "especially heinous, atrocious, or cruel" aggravating circumstance must be construed to require torture or serious physical abuse and that this was error. We do not, however, agree that the Court of Appeals imposed this requirement. It noted cases in which such a requirement sufficed to validate an otherwise vague aggravating circumstance, but it expressly refrained from directing the State to adopt any specific curative construction of the aggravating circumstance at issue here. 822 F. 2d, at 1491–1492. We also do not hold that some kind of torture or serious physical abuse is the only limiting construction of the heinous, atrocious, or cruel aggravating circumstance that would be constitutionally acceptable.

The State also insists that the death penalty should stand because the jury found two aggravating circumstances, one of which was unchallenged and is sufficient to sustain the sentence. When this case was decided, however, the Oklahoma Court of Criminal Appeals would not attempt to save the death penalty when one of several aggravating circumstances found by the jury was found invalid or unsupported by the evidence. As the Tenth Circuit said, there was "no provision for curing on appeal a sentencer's consideration of an invalid aggravating circumstance." *Id.*, at 1482. If this was the case at that time, and the State does not dispute it, the Court of Appeals cannot be faulted for not itself undertaking what the state courts themselves refused to do.

It is true that since the decision of the Court of Appeals, the Oklahoma Court of Criminal Appeals has restricted the "heinous, atrocious, or cruel" aggravating circumstance to those murders in which torture or serious physical abuse is present. *Stouffer* v. *State*, 742 P. 2d 562 (1987). At the same time, that court decided that it would not necessarily set aside a death penalty where on appeal one of several aggravating circumstances has been found invalid or unsupported by the evidence. *Id.*, at 564. See also *Castro* v. *State*, 745 P. 2d 394, 408–409 (1987), cert. denied, 485 U. S. 971 (1988).

What significance these decisions of the Court of Criminal Appeals have for the present case is a matter for the state courts to decide in the first instance. Like that of the Court of Appeals, our judgment is without prejudice to further proceedings in the state courts for redetermination of the appropriate sentence.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

I join the Court's opinion except insofar as the judgment, which is without prejudice to further sentencing proceedings, does not expressly preclude the reimposition of the death penalty. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), I would direct that the resentencing proceedings be circumscribed such that the State may not reimpose the death sentence.

MILLS *v.* MARYLAND

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

No. 87–5367. Argued March 30, 1988—Decided June 6, 1988

Petitioner, a Maryland prison inmate, was tried by a state-court jury and convicted of the first-degree murder of his cellmate. In the trial's sentencing phase, the same jury found that the State had established the statutory aggravating factor that petitioner committed the murder while he was confined in a correctional institution, and marked "no" beside each mitigating circumstance referenced on the verdict form, thereby requiring the imposition of the death penalty under Maryland's capital sentencing scheme. Petitioner challenged the sentence on the ground that the Maryland capital-punishment statute, as applied to him, was unconstitutionally mandatory. He asserted that the statute, as explained to the jury by the court's instructions and as implemented by the verdict form, required imposition of the death sentence if the jury unanimously found an aggravating circumstance, but could not agree unanimously as to the existence of any particular mitigating circumstance; thus, even if some or all of the jurors were to believe that *some* mitigating circumstance or circumstances were present, unless they could unanimously agree on the existence of the *same* mitigating factor, the sentence necessarily would be death. The Maryland Court of Appeals concluded that the death sentence was constitutionally sound, interpreting the statute's unanimity requirement as applying to jury determinations of all critical issues, including the acceptance *or rejection* of mitigating circumstances. The court observed that the verdict form was to be regarded as requiring the jury to agree unanimously in order to mark "no" with respect to the existence of each mitigating circumstance, and that the trial judge's instructions stressed the need for unanimity on all issues presented. The court concluded that, when a jury could not agree unanimously to accept or reject a particular mitigating circumstance, the answer to that circumstance on the verdict form should be left blank and the jury should proceed to the balancing phase, where each juror should weigh the mitigating circumstances he or she found to be established and balance them against the aggravating circumstances unanimously found.

Held:

1. In a capital case, the sentencer may not be precluded from considering, as a mitigating factor, any relevant circumstance, including any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sen-

tence less than death. Under Maryland's statute, if the sentencer finds that any mitigating circumstances have been proved to exist, it then proceeds to decide whether those circumstances outweigh the aggravating circumstances. But if petitioner is correct, a jury that does not unanimously agree on the existence of any single mitigating circumstance may not give mitigating evidence any effect whatsoever, and must impose the death sentence. If that interpretation is correct, the case must be remanded for resentencing. Pp. 373–375.

2. There is a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular mitigating circumstance. Because the jury could have understood that it should mark "no" on the verdict form when it failed to agree unanimously that a mitigating circumstance existed, some jurors might have been prevented from considering factors which might call for a less severe penalty, and petitioner's death sentence cannot stand. Pp. 375–384.

(a) With respect to findings of guilt, a jury's verdict must be set aside if it can be supported on one ground but not on another, and the reviewing court is uncertain which of the two grounds was relied upon by the jury in reaching the verdict. Review of death sentences demands even greater certainty that the jury's conclusions rested on proper grounds. Pp. 375–377.

(b) While the Court of Appeals' construction of the jury instructions and verdict form is plausible, it cannot be concluded, with any degree of certainty, that the jury did not adopt petitioner's interpretation instead. Nothing in the verdict form or the judge's instructions even arguably is construable as suggesting that the jury could leave an answer blank and proceed to the next step in its deliberations. A jury following the instructions set out in the verdict form could be precluded from considering mitigating evidence if only a single juror adhered to the view that such evidence should not be so considered. Pp. 377–380.

(c) There is no extrinsic evidence of what the jury in this case actually thought, but the portions of the record relating to the verdict form and the judge's instructions indicate that there is at least a substantial risk that the jury was misinformed. Moreover, since the time when this case was decided below, the Court of Appeals has promulgated a new verdict form expressly covering the situation where there is a lack of unanimity as to the existence or nonexistence of a particular mitigating factor, and providing for the consideration of all mitigating evidence in determining the sentence. This shows at least some concern on that court's part that juries could misunderstand the previous instructions as to unanimity and the consideration of mitigating evidence by individual jurors. Pp. 380–384.

310 Md. 33, 527 A. 2d 3, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. BRENNAN, J., *post*, p. 389, and WHITE, J., *post*, p. 389, filed concurring opinions. REHNQUIST, C. J., filed a dissenting opinion, in which O'CONNOR, SCALIA, and KENNEDY, JJ., joined, *post*, p. 390.

George E. Burns, Jr., argued the cause for petitioner. With him on the brief were *Alan H. Murrell*, *Michael R. Braudes*, and *Julia Doyle Bernhardt*.

Charles O. Monk II, Deputy Attorney General of Maryland, argued the cause for respondent. With him on the brief were *J. Joseph Curran, Jr.*, Attorney General, and *Gary E. Bair* and *Richard B. Rosenblatt*, Assistant Attorneys General.*

JUSTICE BLACKMUN delivered the opinion of the Court.

Petitioner seeks review of a decision of Maryland's highest court which construes that State's capital sentencing scheme in a manner that preserves its constitutionality but which may not have been evident at all to the jury charged with the sentencing function in this case. Because we have no reason to believe that the jury also arrived at this "saving" construction, we must vacate the sentence of death and remand the case for resentencing.

I

Petitioner Ralph Mills was tried by a state-court jury and convicted of the first-degree murder of his cellmate in the Maryland Correctional Institution in Hagerstown. The jury found that petitioner repeatedly had stabbed his victim with a "shank" or homemade knife. In the sentencing phase of the trial, the same jury found that the State had established

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**Julius L. Chambers*, *Richard H. Burr III*, *Deborah Fins*, and *Anthony G. Amsterdam* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* urging reversal.

the one statutory aggravating circumstance it propounded, namely, that petitioner "committed the murder at a time when he was confined in a correctional institution." App. 99. Defense counsel sought to persuade the jury of the presence of certain mitigating circumstances, in particular, petitioner's relative youth, his mental infirmity, his lack of future dangerousness, and the State's failure to make any meaningful attempt to rehabilitate petitioner while he was incarcerated. *Id.*, at 89–93.[1] On the verdict form provided by the trial court pursuant to the then-existing, but since rescinded, Maryland Rule of Procedure 772A, the jury marked "no" beside each referenced mitigating circumstance and returned a sentence of death.[2]

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[1] Among the mitigating circumstances recognized by statute in Maryland, which the jury was instructed to consider, are:

"4. The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

"5. The youthful age of the defendant at the time of the crime.

. . . . .

"7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

"8. Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case." Md. Ann. Code, Art. 27, § 413(g) (1987).

The defense introduced evidence, including the testimony of petitioner's mother, demonstrating that petitioner had only a sixth-grade education, that he was 20 years old at the time of the murder, and that he had been in trouble from a young age. Since petitioner was 11 or 12 years old, his mother had been in contact with state agencies concerning his behavior. Petitioner underwent therapy as a child, was diagnosed as having "minimal brain damage," and was placed on medication. Petitioner early developed drug and alcohol problems, and was assigned first to the German Children's Home and then to the Maryland Training School for Boys. App. 45–53. At the time of the murder of his cellmate, petitioner was serving the second year of a 30-year sentence for an earlier murder in the second degree.

[2] The jury was instructed to report their conclusions on a Findings and Sentence Determination form called for by Rule 772A. Prior to petitioner's sentencing, Rule 772A was replaced by Maryland Rule of Procedure

Petitioner challenged his conviction and sentence on various grounds, including an argument that the Maryland capital-punishment statute, Md. Ann. Code, Art. 27, § 413 (1987), as applied to him, was unconstitutionally mandatory.[3] Petitioner construed the statute, as explained to the jury by the court's instructions and as implemented by the verdict form, to require the imposition of the death sentence if the jury unanimously found an aggravating circumstance, but could not agree unanimously as to the existence of any particular mitigating circumstance. According to petitioner's view, even if some or all of the jurors were to believe *some* mitigating circumstance or circumstances were present, unless they could unanimously agree on the existence of the *same* mitigating factor, the sentence necessarily would be death.

The Maryland Court of Appeals concluded that the imposition of petitioner's death sentence was constitutionally sound.

4–343, which stipulated the use of a form similar to the one used in this case. The dissent below noted that the form provided under Rule 4–343 should have been used at petitioner's trial, but concluded that no prejudice resulted to petitioner from the use of the similar, but incorrect, form. 310 Md. 33, 77, n. 2, 527 A. 2d 3, 24, n. 2 (1987). Petitioner has not raised here any objection about the use of the outdated form, as opposed to the then-prescribed form. The form actually used at petitioner's trial, with the answers given, is set out in its entirety in the Appendix to this opinion.

[3] The Court of Appeals of Maryland disposed of the claim on the merits despite petitioner's failure, see App. 74; Tr. of Oral Arg. 12–13, to object to the verdict form or jury instructions at the sentencing proceeding. Presumably, the Court of Appeals found this appropriate either as review for plain error, see generally 3A C. Wright, Federal Practice and Procedure § 856 (2d ed. 1982), or because it concluded that Maryland law did not otherwise bar petitioner's claim. In any event, in view of the Maryland court's review on the merits, our jurisdiction over the federal constitutional question is established. See, *e. g.*, *Orr* v. *Orr*, 440 U. S. 268, 274–275 (1979); *Franks* v. *Delaware*, 438 U. S. 154, 161–162 (1978).

We note, in passing, that counsel for petitioner had filed a pretrial motion in which he asserted generally: "That Article 27, Section 413 and 414, and Maryland Rule 772 unconstitutionally restrict the discretion of the finder of fact in determining whether the death penalty should be imposed." Record 24.

310 Md. 33, 527 A. 2d 3 (1987). The court did not dispute that if the statute and form were read as petitioner suggested, jurors *would be* improperly prevented from giving due consideration to mitigating evidence. The court, however, interpreted the statute differently and held that the requirement of unanimity applied to jury determinations of all critical issues including the acceptance *or rejection* of mitigating circumstances, observing that the verdict form was to be regarded as requiring the jury to agree unanimously in order to mark "no" with respect to the existence of each mitigating circumstance, and that the trial judge's instructions stressed the need for unanimity on all issues presented. In the absence of unanimity on the ultimate question of what sentence should be imposed, the statute required the imposition of life imprisonment. See § 413(k)(2).[4] Thus, in the court's view, "[a]s long as one juror believes that there exists a mitigating factor, and that this factor is not outweighed by the aggravating circumstances, and if such juror continues to adhere to his or her position, the sentence will not be death under the statutory scheme." 310 Md., at 54, 527 A. 2d, at 13.

The Court of Appeals recognized, however, that the statute did not fully provide what was to transpire when unanimity was lacking at various stages of the sentencing deliberation. Concluding that the state legislature did not intend that the jury should deadlock and impose a life sentence whenever it could not agree unanimously to accept or reject a particular mitigating circumstance, and pursuant to its statutory authority to fill gaps in the sentencing process, see § 413(*l*), the Court of Appeals instructed that the jury should proceed to the balancing stage, leaving its answer to that circumstance blank. The court directed that each juror weigh the mitigating circumstances he or she found to be established and balance them against the aggravating circumstances unanimously found by the jury. 310 Md., at 66–68, 527 A. 2d, at 19–20.

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[4] At the time of petitioner's trial, § 413(k)(2) provided:

"If the jury, within a reasonable time, is not able to agree as to sentence, the court shall dismiss the jury and impose a sentence of imprisonment for life." See 310 Md., at 55, 527 A. 2d, at 13.

By 1987 Md. Laws, ch. 237, effective July 1, 1987, § 413(k)(2) was amended to read:

"If the jury, within a reasonable time, is not able to agree as to whether a sentence of death shall be imposed, the court may not impose a sentence of death."

We perceive nothing significant for petitioner's case in this 1987 amendment.

The dissenting judge sharply disagreed with the majority's view that the state legislature intended to make the rejection of a mitigating circumstance the kind of ultimate issue that requires unanimity. He observed that the law generally requires unanimity only for verdicts, not for an alternative "predicate or historic fact" in support of the verdict. *Id.*, at 95, 527 A. 2d, at 33. The dissent also concluded that it was probable, or at least reasonably possible, that the jury understood that a "no" answer on the verdict form represented a failure to find unanimously the existence of the circumstance, rather than a unanimous determination that the circumstance did not exist. *Id.*, at 92–95, 527 A. 2d, at 32–33.

Because of the importance of the issue in Maryland's capital-punishment scheme, we granted certiorari. 484 U. S. 975 (1987).

II

Petitioner's argument is straightforward, and well illustrated by a hypothetical situation he contends is possible under the Maryland capital sentencing scheme:[5]

> "If eleven jurors agree that there are six mitigating circumstances, the result is that no mitigating circumstance

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[5] Section 413(b) affords the convicted capital defendant a choice between sentencing by the judge or by the jury. In this case, petitioner invoked his right to be sentenced by his jury. Our discussion of Maryland's sentencing scheme is limited to that context.

> is found. Consequently, there is nothing to weigh against any aggravating circumstance found and the judgment is death even though eleven jurors think the death penalty wholly inappropriate." Brief for Petitioner 11.

The dissent below postulated a situation just as intuitively disturbing: All 12 jurors might agree that some mitigating circumstances were present, and even that those mitigating circumstances were significant enough to outweigh any aggravating circumstance found to exist. But unless all 12 could agree that the same mitigating circumstance was present, they would never be permitted to engage in the weighing process or any deliberation on the appropriateness of the death penalty. 310 Md., at 79–81, 527 A. 2d, at 25–26.

Although jury discretion must be guided appropriately by objective standards, see *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (plurality opinion), it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty under the circumstances so postulated by petitioner or the dissent.[6] It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982), quoting *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion) (emphasis in original). See *Skipper* v. *South Carolina*, 476 U. S. 1, 4 (1986). The corollary that "the sentencer may not refuse to consider *or be precluded from considering*

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[6] Indeed, the Court of Appeals contemplated only two alternative lawful consequences of a lack of unanimity to accept or reject a mitigating circumstance: the jury could deadlock, requiring the imposition of a life sentence, or, as that court has now prescribed, the jury could proceed to the balancing stage where each juror would consider all the evidence in mitigation to reach a conclusion as to whether the death penalty was warranted.

'any relevant mitigating evidence'" is equally "well established." *Ibid.* (emphasis added), quoting *Eddings*, 455 U. S., at 114.[7]

Under Maryland's sentencing scheme, if the sentencer finds that any mitigating circumstance or circumstances have been proved to exist, it then proceeds to decide whether those mitigating circumstances outweigh the aggravating circumstances and sentences the defendant accordingly. § 413(h). But if petitioner is correct, a jury that does not unanimously agree on the existence of any mitigating circumstance may not give mitigating evidence any effect whatsoever, and must impose the sentence of death. See 310 Md., at 67, 527 A. 2d, at 19. Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett* v. *Ohio, supra; Hitchcock* v. *Dugger*, 481 U. S. 393 (1987); by the sentencing court, *Eddings* v. *Oklahoma, supra;* or by an evidentiary ruling, *Skipper* v. *South Carolina, supra.* The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. Whatever the cause, if petitioner's interpretation of the sentencing process is correct, the conclusion would necessarily be the same: "Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing." *Eddings* v. *Oklahoma*, 455 U. S., at 117, n. (O'CONNOR, J., concurring).

III

A

The critical question, then, is whether petitioner's interpretation of the sentencing process is one a reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form employed in this case. See *Francis* v. *Franklin*, 471 U. S. 307, 315–316 (1985) ("The question . . . is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning"), citing *Sandstrom* v. *Montana*, 442 U. S. 510, 516–517 (1979). Accord, *California* v. *Brown*, 479 U. S. 538 (1987). If the jury understood the verdict form as the Court of Appeals asserted it should have, then every time it marked "no" beside a mitigating circumstance it indicated its unanimous conclusion that petitioner had not proved the relevant facts by a preponderance of the evidence, and thus the court properly upheld the judgment.[8] On the other hand, if the jury understood that it should mark "no" when it failed to agree unanimously that a mitigating circumstance existed, then some jurors were prevented from considering "factors which may call for a less severe penalty," *Lockett* v. *Ohio*, 438 U. S., at 605, and petitioner's sentence cannot stand.

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[7] No one has argued here, nor did the Maryland Court of Appeals suggest, that mitigating evidence can be rendered legally "irrelevant" by one holdout vote.

With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See, *e. g.*, *Yates* v. *United States*, 354 U. S. 298, 312 (1957); *Stromberg* v. *California*, 283 U. S. 359, 367–368 (1931). In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, *e. g.*, *Lockett* v. *Ohio*, 438 U. S., at 605 ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); *Andres* v. *United States*, 333 U. S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of § 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused");[9] accord, *Zant* v. *Stephens*, 462 U. S. 862, 884–885 (1983). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand for resentencing.[10]

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[8] Under Maryland law, the jury was not free at this stage to decide that the relevant facts, even if proved, did not have a mitigating effect. That decision already has been made by the state legislature. See § 413(g); see also Tr. of Oral Arg. 38–40. The jury's discretion in attaching significance to the presence of mitigating circumstances is properly exercised at the subsequent balancing stage in the process. See § 413(h).

B

While conceding that the Court of Appeals' construction of the jury instructions and verdict form is plausible, we cannot conclude, with any degree of certainty, that the jury did not adopt petitioner's interpretation of the jury instructions and verdict form. At the conclusion of the sentencing phase, the judge distributed copies of the form to the jurors. (This form is reproduced in its entirety, with the answers given, in the Appendix to this opinion.) After reading aloud the instruction part of the form's Section I and stressing the unanimity requirement, the judge explained: "[Y]ou must consider whether the aggravating circumstance number two has been proven beyond a reasonable doubt. If you unanimously conclude that it has been so proven, you should answer that question yes. *If you are not so satisfied, then of course you must answer no.*" App. 70 (emphasis added). We find it difficult to read into that statement a requirement that the "no" answer, like the "yes" answer, must be unanimous. Indeed, the verdict form establishes at least a rough equivalence between the lack of unanimity to write "yes," and writing "no": the jury learns from the form that its failure to write "yes" beside any aggravating circumstance leads to the imposition of a life sentence, the same result that obtains if the jury answers "no" for every aggravating circumstance.

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[9] In *Andres* v. *United States*, the Court construed a federal statute that required imposition of the death penalty for first-degree murder unless the guilty verdict was "qualified" by the addition of the phrase "without capital punishment." See 333 U. S., at 742, and n. 1. The Court concluded that the statute required the jury to be unanimous *both* as to guilt and as to whether the death penalty should be imposed rather than, as the Government contended, requiring that the death penalty be imposed unless the jury unanimously agreed to impose the qualification. The Court of Appeals for the Ninth Circuit had also rejected the Government's contention and arrived at a construction of the statute similar to that of this Court, but found that the jury instructions had conveyed the proper construction to the jury. This Court disagreed, finding that under the instructions the jury received, they might "reasonably conclude that, if they cannot all agree to grant mercy, the verdict of guilt must stand unqualified." *Id.*, at 752.

[10] We find puzzling the dissent's citation, *post*, at 394, of *Jurek* v. *Texas*, 428 U. S. 262, 279 (1976) (WHITE, J., concurring in judgment), a case in which the Court upheld the very different sentencing procedure followed in Texas. While juries indeed may be capable of understanding the issues posed in capital sentencing proceedings, they must first be properly instructed.

The judge then moved on to Section II of the form, which addresses the jury's determination of which, if any, mitigating circumstances exist. The language at the beginning of that section is identical to that at the beginning of Section I, except that the standard of proof is by a preponderance of the evidence rather than beyond a reasonable doubt, see Appendix to this opinion, *post*, at 387, and we presume that, unless instructed to the contrary, the jury would read similar language throughout the form consistently. The jury was instructed to mark each answer "yes" or "no." Although it was clear that the jury could not mark "yes" in any box without unanimity, nothing the judge said dispelled the probable inference that "no" is the opposite of "yes," and therefore the appropriate answer to reflect an inability to answer a question in the affirmative.[11] Nothing in the verdict form or the judge's instructions even arguably is construable as suggesting the jury could leave an answer blank and proceed to the next stage in its deliberations.[12]

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[11] As the dissent ably reports, the trial judge stressed "[o]ver and over again," *post*, at 393, that the jury's findings had to be unanimous. But not

The only place on the form where the jury had an opportunity to write anything more than "yes" or "no" was with respect to mitigating circumstance number eight, see Appendix to this opinion, *post*, at 388, which permits the jury to recognize as mitigating anything, in addition to the enumerated mitigating factors, that petitioner offered as a basis for a sentence less than death. The judge explained to the jury that if it found any such "other" mitigating circumstances, it must list them in the space provided, and "[i]f you find no other mitigating circumstance then you make no entry upon those lines under number eight." App. 73. No instruction was given indicating what the jury should do if some but not all of the jurors were willing to recognize something about petitioner, his background, or the circumstances of the crime, as a mitigating factor.

Ordinarily, a Maryland jury reaches the balancing stage of the deliberation process any time it unanimously finds at least one mitigating circumstance, or, under the interpretation adopted by the Court of Appeals in this case, any time the jury does not unanimously reject all mitigating circumstances. Had the jurors that sentenced petitioner reached

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once in any of those instructions did the trial court explain to the jury that if it could not reach unanimity to answer "yes," it could do something other than answer "no." The dissent, like the trial court, confuses repetition with clarity, pronouncing "over and over again" that there was only one way the jury could have understood its instructions. See *post*, at 391, 392, 393, and 394. Not even the Maryland Court of Appeals believed that. See, *infra*, at 381–383.

[12] At the conclusion of Section II, once again, the instructions were to the effect that the failure to answer "yes" to any question obtained the same consequence as answering "no" to all questions: "[I]f one or more of the above in section two have been marked yes, then you go on to section three. If all of the above in section two are marked no, then you do not complete section three." App. 73.

Section III,[13] they would have found that even if they had read the verdict form as the Court of Appeals suggests they could have, and marked "yes" or "no" only on the basis of unanimity as to either, they were not free at this point to consider *all* relevant evidence in mitigation as they balanced aggravating and mitigating circumstances. Section III instructed the jury to weigh only those mitigating circumstances marked "yes" in Section II. Any mitigating circumstance not so marked, even if not unanimously rejected, could not be considered by any juror. A jury following the instructions set out in the verdict form could be "precluded from considering, *as a mitigating factor*, [an] aspect of a defendant's character or record [or a] circumstanc[e] of the offense that the defendant proffer[ed] as a basis for a sentence less than death," *Skipper* v. *South Carolina*, 476 U. S., at 4, if even a single juror adhered to the view that such a factor should not be so considered.[14]

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[13] The jury in this case apparently never reached the balancing stage of the process. When the jury returned to the courtroom to report its verdict, even the judge was confused by their failure to complete Section III, in accordance with the form's instructions. See App. 96. The prosecutor suggested, during a colloquy with the court, that the jurors were "hung up on that language." *Ibid.*

[14] For example, some jurors in this case might have found that petitioner's age, 20, constituted a mitigating factor, *i. e.*, youthfulness, under § 413(g)(5). Indeed, in his sentencing report the trial judge noted: "There was evidence from which the jury could have found the existence of Mitigating Circumstance No. 5 (youthful age)." App. 108. Other jurors, on the other hand, might have accepted the prosecutor's argument that petitioner was "not youthful in terms of the criminal justice system," *id.*, at 79, because of his history of criminal activity. Under such circumstances, the lack of unanimity would have prevented the jury from marking that answer "yes." Regardless of whether the answer was marked "no" or left blank, the instructions in Section III would prevent those jurors who thought petitioner's youthfulness was relevant to the ultimate sentencing decision from giving that mitigating circumstance any weight.

C

There is, of course, no extrinsic evidence of what the jury in this case actually thought. We have before us only the verdict form and the judge's instructions. Our reading of those parts of the record leads us to conclude that there is at least a substantial risk that the jury was misinformed. The dissenting judge below was astounded by the majority's reading of the statute and verdict form, which, he said, "appears out of the blue after nearly ten years of extensive litigation involving this statute." 310 Md., at 94, 527 A. 2d, at 33. Looking to the only evidence of jury interpretation available, the dissent noted that on 25 sentencing forms completed in capital cases in which the death penalty was imposed, no answer as to the existence of mitigating circumstances was ever left blank. *Id.*, at 94, n. 9, 527 A. 2d, at 33, n. 9.

One additional bit of evidence about the natural interpretation of the form has become available since this case was decided below on June 25, 1987. On an emergency basis, the Court of Appeals promulgated a new Findings and Sentencing Determination form. See Md. Rule Proc. 4–343(e) (amended July 27, 1987, effective Aug. 17, 1987). The new form expressly incorporates the unanimity requirement as to both accepting and rejecting aggravating circumstances. More significantly, however, the section concerning mitigating circumstances is completely rewritten and changed. Now, under *each* statutory mitigating circumstance, the jury is asked to choose from among three options:

"(Mark only one)

—— (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

—— (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

—— (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponder-

> ance of the evidence that the above circumstance exists." Md. Ann. Code, Md. Rules, Vol. 1 (1988), pp. 494–497.

As before, the new verdict form also provides the jury the opportunity to articulate "additional mitigating circumstances." The new form, however, unlike the one used in petitioner's case, explicitly directs the jury to articulate any such "additional" circumstances that the jurors unanimously agree exist, *and* any found by "[o]ne or more . . . , but fewer than all 12" of the jurors. *Id.*, at 497.

With respect to the consideration of mitigating evidence during the weighing and balancing process, the new verdict form instructs jurors as follows:

> "(If the jury unanimously determines in Section III that no mitigating circumstances exist, do not complete Section IV. Proceed to Section V and enter 'Death.' If the jury *or any juror* determines that one or more mitigating circumstances exist, complete Section IV.)" *Ibid.* (emphasis added).

Section IV now reflects the requirement that jurors not be prevented from considering all evidence in mitigation:

> *"Each individual juror shall weigh* the aggravating circumstances found unanimously to exist against any mitigating circumstances found unanimously to exist, *as well as against any mitigating circumstances found by that individual juror to exist."* *Ibid.* (emphasis added).

Although we are hesitant to infer too much about the prior verdict form from the Court of Appeals' well-meant efforts to remove ambiguity from the State's capital sentencing scheme, we cannot avoid noticing these significant changes effected in instructions to the jury. We can and do infer from these changes at least *some* concern on the part of that court that juries could misunderstand the previous instructions as to unanimity and the consideration of mitigating evidence by individual jurors. We also note, for what it may be worth, that in two cases tried since a Maryland jury has been given the option of reporting nonunanimous votes, the jury has done so.[15]

No one on this Court was a member of the jury that sentenced Ralph Mills, or of any similarly instructed jury in Maryland. We cannot say with any degree of confidence which interpretation Mills' jury adopted. But common sense and what little extrinsic evidence we possess suggest that juries do not leave blanks and do not report themselves as deadlocked over mitigating circumstances after reasonable deliberation, see Tr. of Oral Arg. 42, unless they are expressly instructed to do so.

The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case. The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing.

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[15] Petitioner has lodged with this Court copies of the sentencing forms used in those two cases. In *Wooten-Bey* v. *State* the new sentencing form appears to have made a significant difference: The jury found one aggravating circumstance, but failed to agree on any mitigating circumstance. It did, however, report three statutory mitigating circumstances as found by one or more but fewer than all 12 jurors. The jury also articulated three nonstatutory mitigating circumstances, as found by one or more, but not all, jurors. The jury then reported that it did not unanimously find that the aggravating circumstances marked "proven" outweighed the mitigating circumstances, and unanimously fixed the sentence at life imprisonment. See Findings and Sentencing Determination in No. C. T. 83–1497C (Cty. Ct., Prince George's Cty., 1987).

In *Doering* v. *State* the jury used a verdict form apparently containing aspects of both the old and new forms. The jurors were instructed that in the event one or more of them found a mitigating circumstance not agreed to by all 12, they could leave that answer blank. The jury exercised that option with respect to one statutory mitigating circumstance. The jury also articulated an additional nonstatutory mitigating circumstance found by one or more but not all 12 jurors. Upon balancing aggravating against mitigating circumstances, the jury sentenced the defendant to death. See Findings and Sentencing Determination in No. 86–CR–6128 (Cty. Ct., Baltimore Cty., 1987).

IV

We conclude that there is a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance. Under our cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk.

We therefore vacate the judgment of the Court of Appeals insofar as it sustained the imposition of the death penalty.[16] The case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

FINDINGS AND SENTENCE DETERMINATION FORM EMPLOYED AT PETITIONER'S TRIAL

"Section I

"Based upon the evidence we unanimously find that each of the following aggravating circumstances which is marked

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[16] Because our conclusion on this issue is sufficient to dispose of the case, we refrain from any review of the Court of Appeals' *sua sponte* declaration, see 310 Md., at 72, n. 14, 527 A. 2d, at 22, n. 14, that no "victim impact statement" was introduced in evidence in contravention of our decision last Term in *Booth* v. *Maryland*, 482 U. S. 496 (1987).

'yes' has been proven BEYOND A REASONABLE DOUBT and each aggravating circumstance which is marked 'no' has not been proven BEYOND A REASONABLE DOUBT:

"1. The victim was a law enforcement officer who was murdered while in the performance of his duties.

	X
yes	no

"2. The defendant committed the murder at a time when he was confined in a correctional institution.

X	
yes	no

"3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

	X
yes	no

"4. The victim was a hostage taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

	X
yes	no

"5. The victim was a child abducted in violation of Code, Article 27, § 2.

	X
yes	no

"6. The defendant committed the murder pursuant to an agreement to contract for remuneration or the promise of remuneration to commit the murder.

	X
yes	no

"7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

	X
yes	no

"8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.

	X
yes	no

"9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.

	X
yes	no

"10. The Defendant committed the murder while committing or attempting to commit robbery, arson or rape or sexual offense in the first degree.

	X
yes	no

"(If one or more of the above are marked 'yes', complete Section II. If all of the above are marked 'no', do not complete Sections II and III.)

"Section II

"Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven to exist by A PREPONDERANCE OF THE EVIDENCE and each mitigating circumstance marked 'no' has not been proven by A PREPONDERANCE OF THE EVIDENCE:

"1. The defendant previously (i) has not been found guilty of a crime of violence; and (ii) has not entered a plea of guilty or nolo contendere to a charge of a crime of violence; and (iii) has not been granted probation on stay or entry of judgment pursuant to a charge or a crime of violence. As used in this paragraph, 'crime of violence' means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

	X
yes	no

"2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

	X
yes	no

"3. The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

	X
yes	no

"4. The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance.

	X
yes	no

"5. The youthful age of the defendant at the time of the crime.

	X
yes	no

"6. The act of the defendant was not the sole proximate cause of the victim's death.

	X
yes	no

"7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

	X
yes	no

"8. Other mitigating circumstances exist, as set forth below:

None.

"(If one or more of the above in Section II have been marked 'yes', complete Section III. If all of the above in Section II are marked 'no', you do not complete Section III.)

"Section III

"Based on the evidence we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked 'yes' in

Section II outweigh the aggravating circumstances marked 'yes' in Section I.

____ ____
yes no

"DETERMINATION OF SENTENCE

"Enter the determination of sentence either 'Life Imprisonment' or 'Death' according to the following instructions:

"1. If all of the answers in Section I are marked 'no' enter 'Life Imprisonment.'

"2. If Section III was completed and was marked 'yes' enter 'Life Imprisonment.'

"3. If Section II was completed and all of the answers were marked 'no' then enter 'Death.'

"4. If Section III was completed and was marked 'no' enter 'Death.'

"We unanimously determine the sentence to be Death." App. 99–103.

JUSTICE BRENNAN, concurring.

I join the Court's opinion and agree fully with its analysis as to why, under our current death penalty jurisprudence, the death sentence in this case must be vacated. I write separately only because the judgment, which is without prejudice to further sentencing proceedings, does not expressly preclude the reimposition of the death penalty. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would direct that the resentencing proceedings be circumscribed such that the State may not reimpose the death sentence.

JUSTICE WHITE, concurring.

The issue in this case is how reasonable jurors would have understood and applied their instructions. That is the issue the Court's opinion addresses, and I am persuaded that the Court reaches the correct solution. Hence, I join the Court's opinion.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

The Court here decides that the sentence imposed by a Maryland jury is constitutionally infirm because the Court cannot be certain that each juror understood the sentencing instructions and charges to the jury. Last Term, in *California* v. *Brown*, 479 U. S. 538 (1987), we reaffirmed our view that the relevant inquiry is not whether an impermissible interpretation of instructions to the jury, however improbable, is literally possible; it is instead "what a reasonable juror could have understood the charge as meaning." *Id.*, at 541. I think the instructions and charges to the jury in this case pass this test, and I would affirm petitioner's sentence as well as his conviction.

I

Petitioner, already serving a 30-year sentence for a murder he committed in 1982, stabbed his cellmate 6 times in the chest and 39 times in the back with a homemade knife. Petitioner had threatened to kill his cellmate several weeks earlier if numerous demands were not met by the prison warden, and on August 6, 1984, he made good on his threat. Evidence at trial strongly suggested that this brutal assault was unprovoked and was initiated while the victim was asleep.

After finding petitioner guilty of first-degree murder, the Maryland jury hearing his case proceeded to the sentencing phase of the trial. As part of the sentencing process, the jury was provided with the standard sentencing form. Although the sentencing form is reproduced in the Appendix to the majority's opinion, I believe it is useful to review the instructions and the charges that confronted the jurors.

Section I of the sentencing form requires the jurors unanimously to determine whether or not several aggravating circumstances existed; the jurors unanimously found that "[t]he defendant committed the murder at a time when he was confined in a correctional institution." App. 99–101. After reaching this decision, the jury moved on to Section II of the form, which began:

> "Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven to exist by A PREPONDERANCE OF THE EVIDENCE and each mitigating circumstance marked 'no' has not been proven by A PREPONDERANCE OF THE EVIDENCE." Appendix to opinion of Court, *ante*, at 387.

These instructions were followed by seven possible mitigating factors. After each one was the choice "__ yes [or] __ no"; the jurors checked "no" for each factor, and for the eighth and final question whether "[o]ther mitigating circumstances exist, as set forth below," the jury wrote "none." App. 101–103.

The jury's negative responses, when examined in the light of the directions in Section II, admit of but one reasonable interpretation: the jury *unanimously* found that no mitigating factors existed that should be weighed against the aggravating circumstance that it unanimously determined was present. This is "what a reasonable juror [would] have understood the charge as meaning," and there is absolutely no reason to think that this meaning was not abundantly plain to the jurors acting under these instructions.[1]

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[1] The majority attempts, through the backdoor of a footnote, see *ante*, at 380, n. 14, to explain what an individual juror *might* have considered persuasive as a mitigating circumstance. In addition to pointing up the fact that the majority has no evidence to support the hypothetical reading of the sentencing form it imputes to the jury, a review of the mitigating factors offered by petitioner in this case reveals that they were extraordinarily weak. At sentencing, petitioner urged that his "youthful age" of 20

These instructions, which by themselves would serve as an understandable guide to the jury in its deliberations, were accompanied by additional charges from the trial judge. Although the Court ignores several of these charges, I do not think it open to doubt that they reinforce the jury's understanding that it must unanimously reach a decision on each question before proceeding to the next. After distributing the sentencing forms, the trial judge delivered the following charges:

> "Let me remind you that in reaching your determination as to any of the issues raised by the case and presented to you on this sentencing form *your verdict must be unanimous;* that is, all twelve of you must agree.
>
> . . . . .
>
> "Now should you find the existence unanimously and beyond a reasonable doubt of aggravating circumstance number two and mark that yes, then you should proceed to section two, which begins at the top of page two. That provides that based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked yes has been proven to exist by a preponderance of the evidence, and each mitigating circumstance marked no has not been proven by a preponderance of the evidence. Again I stress that *your finding as to mitigating circumstances must be unanimous*, that is you must all agree.
>
> . . . . .
>
> "*Again let me stress the requirement of unanimity*, that is your finding under section two and your findings

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should weigh in his favor, and argued that, despite the fact that he had murdered twice, it was "unlikely that [he would] engage in further criminal activity that would constitute a continuing threat to society." 310 Md. 33, 57, 527 A. 2d 3, 14 (1987). Petitioner also asserted as an extenuating circumstance the failure of the State effectively to reform him. In view of the vacuity of these proffered mitigating factors, it is hardly surprising that the jury would unanimously reject them.

> under section three must be one in which all twelve of you agree.
>
> . . . . .
>
> "Again let me remind you of the burdens of proof as I have defined them for you and the requirement that *your verdict or your decision with regard to any of these items must be unanimous.*
>
> . . . . .
>
> "Let me remind you that . . . as you consider each of the circumstances you must indicate yes or no, *however your unanimous decision falls.*" *Id.*, at 69, 70–71, 73, 74, 95 (emphasis added).

Over and over again, the trial court exhorted the jury that *every* determination made on the sentencing form had to be a unanimous one. This repeated emphasis, when combined with the instructions on the face of Section II itself, simply had to alert the jury to the requirement of unanimity. To conclude otherwise, as the Court does, applies to the deliberations of jurors and the instructions of judges a requirement of freedom from any ambiguity more suitable to mathematics or the physical sciences than to the affairs of human beings.[2]

I am also more than a little uncertain about the standard the majority purports to employ in finding that the jury may not have understood its instructions as intended. In *California* v. *Brown*, 479 U. S. 538 (1987), we held that the correct inquiry in this situation is "'what a reasonable juror could have understood the charge as meaning.'" *Id.*, at 541, quoting *Francis* v. *Franklin*, 471 U. S. 307, 316 (1985); see also *Sandstrom* v. *Montana*, 442 U. S. 510, 516–517 (1979). Thus, in *Brown* we found that a reasonable juror would reject the construction of the jury charge advanced by the defendant, and would instead understand that the trial judge's instruction not to rely on "mere sympathy" was "a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." 479 U. S., at 542. Similarly, in *Jurek* v. *Texas*, 428 U. S. 262 (1976), a majority of the Court concluded that the issues arising in the Texas sentencing proceeding "have a common-sense core of meaning and that criminal juries should be capable of understanding them." *Id.*, at 279 (WHITE, J., concurring in judgment) (agreeing with joint opinion by Stewart, Powell, and STEVENS, JJ.). *Jurek* demonstrates that the interpretation a reasonable juror would give to instructions from the trial court is the determinative element in this Court's review.

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[2] The Court seems to derive support from the fact that the Maryland Court of Appeals has recently modified its sentencing form, see *ante*, at 381–383. While any clarification in the form is of course welcome, the amendment is of no legal relevance to our decision today. As discussion at oral argument suggested, a sentencing instruction that is constitutionally acceptable may be improved in any number of ways. Tr. of Oral Arg. 11–12. Our determination here is only whether the sentencing instructions and the jury charges submitted in this case were permissible.

For this reason, the Court's reliance on *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), is misplaced. The issue here is not whether the jurors were permitted to hear all the extenuating evidence petitioner cared to present; they undoubtedly were. Rather, as in *Brown* and *Jurek*, the question is whether a reasonable juror operating under the trial court's instructions would have considered this evidence of mitigating circumstances in a constitutional manner. In the present case, would a reasonable juror understand that, to mark "no" to each mitigating factor on the sentencing form, all 12 jurors must agree? The language of Section II of the form, when coupled with the repeated instructions from the trial judge, leaves no doubt that the answer is in the affirmative.

The Court states that "[b]ecause we have no reason to believe that the jury also arrived at" the proper interpretation of the sentencing form, petitioner's sentence must be vacated and his case remanded for resentencing. *Ante*, at 369. The

Court also proposes that "[u]nless we can rule out the substantial possibility that the jury may have rested its verdict" on an improper construction of the sentencing instructions and jury charges, petitioner's sentence must be set aside. *Ante*, at 377. This formulation obscures considerably what I view as the correct standard set forth in *Brown*. Short of ordering a separate trial to investigate the knowledge of each juror and the discussions among all 12, I can envision no method by which the court can ever attain the level of certainty on which the majority insists. Jury deliberations are by nature secret, and the mental processes of individual jurors equally recondite. To demand this degree of assurance in conducting judicial review of jury proceedings would establish a standard which can never be satisfied.

As the preceding discussion indicates, if the "reasonable juror" standard is employed, the instructions on the sentencing form and the charges given to the jury in this case are constitutionally unexceptionable, and petitioner's sentence should be upheld.

II

Since the majority finds dispositive petitioner's argument that the jurors may not have understood the unanimity requirements of the sentencing instructions and jury charges, it does not reach the second issue in the case. See *ante*, at 384, n. 16. Because I would reject the challenge to the instructions, I must continue on and deal with petitioner's claim that the trial judge improperly allowed into evidence statements concerning the personal characteristics of the victim, Paul Brown, in violation of our recent decision in *Booth* v. *Maryland*, 482 U. S. 496 (1987). Although petitioner failed to object at trial to the introduction of this evidence,[3] the Maryland Court of Appeals nonetheless found that the information about Brown did not constitute a proscribed victim impact statement. The issue is thus properly before this Court, see *Orr* v. *Orr*, 440 U. S. 268, 274–275 (1979); *Illinois* v. *Gates*, 462 U. S. 213, 218, n. 1 (1983); *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434–435 (1940), and I would uphold the Court of Appeals' determination.

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[3] Petitioner did, however, challenge the Maryland Court of Appeals' decision on the admissibility of the evidence about the victim in his petition for certiorari and in his brief. See Pet. for Cert. 8–10; Brief for Petitioner 21–24.

Attached to the Maryland Division of Parole and Probation's investigation report of the crime was a memorandum to the State's Attorney, which summarized an interview conducted by a caseworker with the victim's brother and sister-in-law. After petitioner's counsel informed the court that he had read the memorandum and did not object to its admission, the trial judge allowed it into evidence. In its entirety, the memorandum stated:

> "'Paul and Thomas Brown came from a family of six. At a very young age they were removed from their parents *[sic]* custody because of neglect and placed in separate foster homes. (Removal by the Department of Social Services was prompted by Paul being hospitalized at age 4 for anemia and malnutrition).
>
> "'Paul was a hyperactive child and hard to handle which resulted in a lot of beatings from his various guardians. He ran away constantly from the various homes in which he had been placed. After a while Paul, at the age of 15, just started living on the streets. He was eventually sent to the Maryland Training School for Boys. Paul never really had a home or a family as such. "I (Thomas Brown) tried to keep in touch with Paul by writing and visiting him whenever possible. I always had good homes and a good life and always felt so guilty that there was nothing I could do to help Paul. After all, I was only one year older than he."
>
> "'"Paul was a good person who had a tough life, a lot of bad breaks, no family, no home, nobody to really give him a chance. I sometimes think he felt more secure in prison, because he had no one on the outside. Sure, he

> committed crimes, but he wasn't violent. He did what he had to do to survive and he got involved with a lot of bad people."'" 310 Md. 33, 72, n. 14, 527 A. 2d 3, 22, n. 14 (1987).

Several points should be made about this memorandum. First, it did not purport to be, and the Maryland Court of Appeals found that it did not fall within the statutory requirements of, a victim impact statement under Maryland law. See *ibid.;* see also Md. Ann. Code, Art. 41, § 4–609(c) (1986). The statements summarized in the memorandum did not describe the effect of the murder on the family and friends of the victim. Nor did the memorandum contain opinions and characterizations by Paul Brown's brother and sister-in-law of the crime. At most, this thumbnail sketch of the victim's difficult childhood and frequent encounters with correctional authorities gave the jury a quick glimpse of the life petitioner chose to extinguish.

I joined the dissents in *Booth* v. *Maryland, supra,* at 515 and 519, and continue to believe that that case was wrongly decided. Virtually no limits are placed on the mitigating evidence a capital defendant may introduce concerning his own history and circumstances, yet the State is precluded from demonstrating the loss to the victim's family, and to society as a whole, through the defendant's homicide. If a jury is to assess meaningfully the defendant's moral culpability and blameworthiness, one essential consideration should be the extent of the harm caused by the defendant. In large measure, the Court's decision in *Booth* prevents the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.

But even if I were to accept the majority's rationale in *Booth,* I would still find that the statements about the victim summarized in the present memorandum were correctly admitted into evidence. The victim impact statements ruled inadmissible in *Booth,* in addition to containing information about the elderly couple killed by the defendant, also included substantial material concerning the effect of the crime on the victims' family and friends, the loss to the community, and the family's perceptions of the defendant. By contrast, the summary admitted here gave only the barest of details about Paul Brown himself and no information at all about the impact of his death on others. I do not interpret *Booth* as foreclosing the introduction of all evidence, in whatever form, about a murder victim, and would thus conclude that the trial court did not commit error in admitting the summary in this case.

LINGLE *v.* NORGE DIVISION OF MAGIC CHEF, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 87-259. Argued March 23, 1988—Decided June 6, 1988

After petitioner notified her employer (respondent) that she had been injured in the course of her employment and requested compensation for her medical expenses pursuant to the Illinois Workers' Compensation Act, she was discharged for filing an allegedly false worker's compensation claim. The union representing petitioner filed a grievance pursuant to a collective-bargaining agreement that protected employees from discharge except for "just" cause and that provided for arbitration of disputes between the employer and any employee concerning the effect or interpretation of the agreement. While arbitration was proceeding, petitioner filed a retaliatory discharge action in an Illinois state court, alleging that she had been discharged for exercising her rights under the Illinois worker's compensation laws. Respondent removed the suit to the Federal District Court on the basis of diversity of citizenship, and filed a motion to dismiss the case as pre-empted by § 301 of the Labor Management Relations Act, 1947. The court dismissed the complaint as pre-empted, concluding that the retaliatory-discharge claim was "inextricably intertwined" with the collective-bargaining provision prohibiting discharge without just cause, and that allowing the state-law action to proceed would undermine the arbitration procedures in the collective-bargaining contract. The Court of Appeals affirmed.

Held: Application of petitioner's state tort remedy was not pre-empted by § 301. An application of state law is pre-empted by § 301 only if such application requires the interpretation of a collective-bargaining agreement. Pp. 403–413.

(a) If the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor law principles—necessarily uniform throughout the Nation—must be employed to resolve the dispute. *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95; *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202. Pp. 403–406.

(b) Under Illinois law governing the tort of retaliatory discharge for filing a worker's compensation claim, the employee must show both that he was discharged or threatened with discharge and that the employer's motive was to deter the employee from exercising rights under the

Workers' Compensation Act or to interfere with the exercise of those rights. Neither of those elements requires a court to interpret any term of a collective-bargaining agreement. Similarly, the factual inquiry as to whether the employer had a nonretaliatory reason for the discharge does not turn on the meaning of any provision of a collective-bargaining agreement. Although the state-law analysis might involve attention to the same factual considerations as the contractual determination whether petitioner was fired for just cause, such parallelism does not render the state-law analysis dependent upon the contractual analysis. As long as the state-law claim can be resolved without interpreting the collective-bargaining agreement itself, the claim is "independent" of the agreement for § 301 pre-emption purposes. Pp. 406–410.

(c) The result in this case is consistent both with the policy of fostering uniform, certain adjudication of disputes over the meaning of collective-bargaining agreements, and with cases that have permitted separate fonts of substantive rights to remain unpre-empted by other federal labor law statutes. Interpretation of collective-bargaining agreements remains firmly in the arbitral realm; judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective-bargaining agreements. There is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective-bargaining agreements. Pp. 410–413.

823 F. 2d 1031, reversed.

STEVENS, J., delivered the opinion for a unanimous Court.

Paul Alan Levy argued the cause for petitioner. With him on the briefs was *Alan B. Morrison*.

Charles C. Jackson argued the cause for respondent. With him on the brief were *J. Stephen Poor*, *P. Michael Kimmel*, and *Edward H. Graham*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Minnesota et al. by *Hubert H. Humphrey III*, Attorney General of Minnesota, and *Steven M. Gunn* and *Scott R. Strand*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Joseph I. Lieberman* of Connecticut, *Warren Price III* of Hawaii, *Neil F. Hartigan* of Illinois, *David L. Armstrong* of Kentucky, *James E. Tierney* of Maine, *William L. Webster* of Missouri, *Robert M. Spire* of Nebraska, *W. Cary Edwards* of New Jersey, *Hal Stratton* of New Mexico, *Anthony J. Celebrezze* of Ohio, Dave Frohnmayer of Oregon, *Jim Mattox* of Texas, *Jeffrey L. Amestoy* of Vermont, *Kenneth O. Eikenberry* of Washington, JUSTICE STEVENS delivered the opinion of the Court.

In Illinois an employee who is discharged for filing a worker's compensation claim may recover compensatory and punitive damages from her employer. The question presented in this case is whether an employee covered by a collective-bargaining agreement that provides her with a contractual remedy for discharge without just cause may enforce her state-law remedy for retaliatory discharge. The Court of Appeals held that the application of the state tort remedy was pre-empted by § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185. 823 F. 2d 1031 (CA7 1987) (en banc). We disagree.

I

Petitioner was employed in respondent's manufacturing plant in Herrin, Illinois. On December 5, 1984, she notified respondent that she had been injured in the course of her employment and requested compensation for her medical expenses pursuant to the Illinois Workers' Compensation Act. On December 11, 1984, respondent discharged her for filing a "false worker's compensation claim." *Id.*, at 1033.

The union representing petitioner promptly filed a grievance pursuant to the collective-bargaining agreement that covered all production and maintenance employees in the Herrin plant. The agreement protected those employees, including petitioner, from discharge except for "proper" or "just" cause, App. 13–14, and established a procedure for the arbitration of grievances, *id.*, at 10–11. The term grievance

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Charles G. Brown of West Virginia, and *Donald J. Hanaway* of Wisconsin; for the American Federation of Labor and Congress of Industrial Organizations by *Marsha S. Berzon*, *David Silberman*, and *Laurence Gold;* and for the National Conference of State Legislatures et al. by *Benna Ruth Solomon*, *Beate Bloch*, *James E. Pfander*, and *Cynthia M. Moore.*

Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States of America by *Peter G. Nash*, *Dixie L. Atwater*, and *Stephen A. Bokat;* and for the Equal Employment Advisory Council by *Robert E. Williams* and *Douglas S. McDowell.*

was broadly defined to encompass "any dispute between . . . the Employer and any employee, concerning the effect, interpretation, application, claim of breach or violation of this Agreement." *Id.*, at 10. Ultimately, an arbitrator ruled in petitioner's favor and ordered respondent to reinstate her with full backpay. See *id.*, at 25–26.

Meanwhile, on July 9, 1985, petitioner commenced this action against respondent by filing a complaint in the Illinois Circuit Court for Williamson County, alleging that she had been discharged for exercising her rights under the Illinois workers' compensation laws. App. 2–4; see *Kelsay* v. *Motorola, Inc.*, 74 Ill. 2d 172, 384 N. E. 2d 353 (1978); *Midgett* v. *Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 473 N. E. 2d 1280 (1984); see also Ill. Rev. Stat., ch. 48, ¶138.4(h) (1987). Respondent removed the case to the Federal District Court on the basis of diversity of citizenship, and then filed a motion praying that the court either dismiss the case on pre-emption grounds or stay further proceedings pending the completion of the arbitration. Record, Doc. No. 7. Relying on our decision in *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202 (1985), the District Court dismissed the complaint. It concluded that the "claim for retaliatory discharge is 'inextricably intertwined' with the collective bargaining provision prohibiting wrongful discharge or discharge without just cause" and that allowing the state-law action to proceed would undermine the arbitration procedures set forth in the parties' contract. 618 F. Supp. 1448, 1449 (SD Ill. 1985).

The Court of Appeals agreed that the state-law claim was pre-empted by § 301. In an en banc opinion, over the dissent of two judges, it rejected petitioner's argument that the tort action was not "inextricably intertwined" with the collective-bargaining agreement because the disposition of a retaliatory discharge claim in Illinois does not depend upon an interpretation of the agreement; on the contrary, the court concluded that "the same analysis of the facts" was implicated under both procedures. 823 F. 2d, at 1046. It took note of, and declined to follow, contrary decisions in the Tenth, Third, and Second Circuits.[1] We granted certiorari to resolve the conflict in the Circuits. 484 U. S. 895 (1987).

II

Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. § 185(a), provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

In *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957), we held that § 301 not only provides federal-court jurisdiction over controversies involving collective-bargaining agreements, but also "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." *Id.*, at 451.[2]

In *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), we were confronted with a straightforward question of contract interpretation: whether a collective-bargaining agreement implicitly prohibited a strike that had been called by the union. The Washington Supreme Court had answered that question by applying state-law rules of contract interpretation. We rejected that approach, and held that § 301 mandated resort to federal rules of law in order to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes.[3]

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[1] *Peabody Galion* v. *Dollar*, 666 F. 2d 1309 (CA10 1981); *Herring* v. *Prince Macaroni of New Jersey, Inc.*, 799 F. 2d 120, 124, n. 2 (CA3 1986); *Baldracchi* v. *Pratt & Whitney Aircraft Div., United Technologies Corp.*, 814 F. 2d 102 (CA2 1987); but see *Johnson* v. *Hussmann Corp.*, 805 F. 2d 795 (CA8 1986) (retaliatory discharge claim pre-empted by § 301).

[2] We later concluded that state courts have concurrent jurisdiction over § 301 claims. *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (1962). State as well as federal courts must apply federal law in deciding these claims. See *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95, 102 (1962).

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[3] Our discussion of the pre-emptive scope of § 301 bears repeating:

"It was apparently the theory of the Washington court that, although *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, requires the federal courts to fashion, from the policy of our national labor laws, a body of federal law for the enforcement of collective-bargaining agreements, nonetheless, the courts of the States remain free to apply individualized local rules when called upon to enforce such agreements. This view cannot be accepted. The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy.

"More important, the subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' . . . The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.

"The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. With due regard to the many factors which bear upon competing state and fed-

In *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202 (1985), we considered whether the Wisconsin tort remedy for bad-faith handling of an insurance claim could be applied to the handling of a claim for disability benefits that were authorized by a collective-bargaining agreement. We began by examining the collective-bargaining agreement, and determined that it provided the basis not only for the benefits, but also for the right to have payments made in a timely manner. *Id.*, at 213–216. We then analyzed the Wisconsin tort remedy, explaining that it "exists for breach of a 'duty devolv[ed] upon the insurer by reasonable implication from the express terms of the contract,' the scope of which, crucially, is 'ascertained from a consideration of the contract itself.'" *Id.*, at 216 (quoting *Hilker* v. *Western Automobile Ins. Co.*, 204 Wis. 1, 16, 235 N. W. 413, 415 (1931)). Since the "parties' agreement as to the manner in which a benefit claim would be handled [would] necessarily [have been] relevant to any allegation that the claim was handled in a dilatory manner," 471 U. S., at 218, we concluded that § 301 pre-empted the application of the Wisconsin tort remedy in this setting.

Thus, *Lueck* faithfully applied the principle of § 301 pre-emption developed in *Lucas Flour*:[4] if the resolution of a

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eral interests in this area, . . . we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." 369 U. S., at 103–104 (citations omitted; footnote omitted).

[4] We applied this same principle of § 301 pre-emption just last Term to a case in which the plaintiff had conceded that the "'nature and scope of the duty of care owed [her] is determined by reference to the collective bargaining agreement.'" *Electrical Workers* v. *Hechler*, 481 U. S. 851, 863, n. 5 (1987) (citation omitted). Plaintiff had brought a Florida tort law claim alleging that her union had "breached its duty of care to provide a union member with a safe workplace." *Id.*, at 853. Our analysis of Florida law revealed that "[t]he threshold inquiry for determining if a cause of action exists is an examination of the contract to ascertain what duties were accepted by each of the parties and the scope of those duties." *Id.*, at 860. Thus agreeing with the characterization of Florida law embodied in plaintiff's concession, we concluded that § 301 pre-empted the state-law

state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles—necessarily uniform throughout the Nation—must be employed to resolve the dispute.[5]

III

Illinois courts have recognized the tort of retaliatory discharge for filing a worker's compensation claim, *Kelsay* v. *Motorola, Inc.*, 74 Ill. 2d 172, 384 N. E. 2d 353 (1978),[6] and

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claim. See also *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965) (state-law application to suit for severance pay under collective-bargaining agreement pre-empted by § 301).

[5] We have twice applied the *Lucas Flour* § 301 pre-emption principle in determining whether a state-law claim brought in state court was properly removed to federal court. In *Avco Corp.* v. *Machinists*, 390 U. S. 557 (1968), we determined that a state-law suit brought in state court to enjoin a strike was properly removed to federal court despite the plaintiff's failure to plead a federal cause of action, because "the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'" *Franchise Tax Bd. of California* v. *Construction Laborers Vacation Trust for Southern California*, 463 U. S. 1, 23 (1983) (quoting § 301). Conversely, in *Caterpillar Inc.* v. *Williams*, 482 U. S. 386 (1987), see n. 10, *infra*, we held that a state-law complaint brought in state court for breach of *individual* employment contracts was not "completely pre-empted" by § 301, 482 U. S., at 394, because § 301 "says nothing about the content or validity of *individual* employment contracts." *Ibid.* (emphasis added). Both *Avco* and *Caterpillar* are examples of the *Lucas Flour* § 301 pre-emption principle: in the former case, plaintiff's claim required construing the collective-bargaining agreement in question; in the latter case, plaintiffs' claim did not turn on any collective-bargaining agreement interpretation.

[6] Although the cause of action was not based on any specific statutory provision, the following section of the Illinois Workers' Compensation Act expresses the public policy underlying the common-law development:

"It shall be unlawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights or remedies granted to him or her by this Act or to discriminate, attempt to discriminate, or have held that it is applicable to employees covered by union contracts, *Midgett* v. *Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 473 N. E. 2d 1280 (1984), cert. denied, 474 U. S. 909 (1985). "[T]o show retaliatory discharge, the plaintiff must set forth sufficient facts from which it can be inferred that (1) he was discharged or threatened with discharge and (2) the employer's motive in discharging or threatening to discharge him was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights." *Horton* v. *Miller Chemical Co.*, 776 F. 2d 1351, 1356 (CA7 1985) (summarizing Illinois state-court decisions), cert. denied, 475 U. S. 1122 (1986); see *Gonzalez* v. *Prestress Engineering Corp.*, 115 Ill. 2d 1, 503 N. E. 2d 308 (1986). Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement. To defend against a retaliatory discharge claim, an employer must show that it had a nonretaliatory reason for the discharge, cf. *Loyola University of Chicago* v. *Illinois Human Rights Comm'n*, 149 Ill. App. 3d 8, 500 N. E. 2d 639 (1986); this purely factual inquiry likewise does not turn on the meaning of any provision of a collective-bargaining agreement. Thus, the state-law remedy in this case is "independent" of the collective-bargaining agreement in the sense of "independent" that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement.[7]

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threaten to discriminate against an employee in any way because of the exercise of his or her rights granted to him or her by this Act.

"It shall be unlawful for any employer, individually or through any insurance company or service or adjustment company, to discharge or threaten to discharge, or to refuse to rehire or recall to active service in a suitable capacity an employee because of the exercise of his or her rights or remedies granted him or her by this Act." Ill. Rev. Stat., ch. 48, ¶ 138.4(h) (1987).

[7] Such independence was not present either in *Lucas Flour*, *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202 (1985), or *Electrical Workers*

The Court of Appeals seems to have relied upon a different way in which a state-law claim may be considered "independent" of a collective-bargaining agreement. The court wrote that "the just cause provision in the collective-bargaining agreement may well prohibit such retaliatory discharge," and went on to say that if the state-law cause of action could go forward, "a state court would be deciding precisely the *same issue* as would an arbitrator: whether there was 'just cause' to discharge the worker." 823 F. 2d, at 1046 (emphasis added). The court concluded, "the state tort of retaliatory discharge is inextricably intertwined with the collective-bargaining agreements here, because it implicates the *same analysis of the facts* as would an inquiry under the just cause provisions of the agreements." *Ibid.* (emphasis added). We agree with the court's explanation that the state-law analysis might well involve attention to the same factual considerations as the contractual determination of whether Lingle was fired for just cause. But we disagree with the court's conclusion that such parallelism renders the state-law analysis dependent upon the contractual analysis. For while there may be instances in which the National Labor Relations Act pre-empts state law on the basis of the subject mat-

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v. *Hechler*, 481 U. S. 851 (1987); see n. 4, *supra*. In all of those cases, pertinent principles of state law required construing the relevant collective-bargaining agreement. Not so here.

Petitioner points to the fact that the Illinois right to be free from retaliatory discharge is nonnegotiable and applies to unionized and nonunionized workers alike. While it may be true that most state laws that are not pre-empted by § 301 will grant nonnegotiable rights that are shared by all state workers, we note that neither condition ensures nonpre-emption. It is conceivable that a State could create a remedy that, although nonnegotiable, nonetheless turned on the interpretation of a collective-bargaining agreement for its application. Such a remedy would be pre-empted by § 301. Similarly, if a law applied to all state workers but required, at least in certain instances, collective-bargaining agreement interpretation, the application of the law in those instances would be pre-empted. Conversely, a law could cover only unionized workers but remain unpre-empted if no collective-bargaining agreement interpretation was needed to resolve claims brought thereunder.

ter of the law in question,[8] § 301 pre-emption merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements.[9] In other words, even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 pre-emption purposes.[10]

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[8] Although § 301 pre-empts state law only insofar as resolution of the state-law claim requires the interpretation of a collective-bargaining agreement, and although § 301 pre-emption is all that is at issue in this case, it is important to remember that other federal labor-law principles may pre-empt state law. Thus, in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 244 (1959), we held that "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act [NLRA], or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." We added that "courts are not primary tribunals to adjudicate . . . issues" such as "whether the particular activity regulated by the States [is] governed by § 7 or § 8 or [is], perhaps, outside both these sections." *Ibid.* Rather, "[i]t is essential to the administration of the [NLRA] that these determinations be left in the first instance to the National Labor Relations Board." *Id.*, at 244–245.

"A second pre-emption doctrine protects against state interference with policies implicated by the structure of the [NLRA] itself, by pre-empting state law and state causes of action concerning conduct that Congress intended to be unregulated." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 749 (1985). This doctrine "was designed, at least initially, to govern pre-emption questions that arose concerning activity that was neither arguably protected against employer interference by §§ 7 and 8(a)(1) of the NLRA, nor arguably prohibited as an unfair labor practice by § 8(b) of that Act. . . . Such action falls outside the reach of *Garmon* pre-emption." *Ibid.* We referred to this second pre-emption doctrine in *Metropolitan Life* as "*Machinists* pre-emption," after *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132 (1976), in which we had "ruled that a State may not penalize a concerted refusal to work overtime that was neither prohibited nor protected under the NLRA." 471 U. S., at 750.

[9] Whether a union may *waive* its members' individual, nonpre-empted state-law rights, is, likewise, a question distinct from that of whether a claim is pre-empted under § 301, and is another issue we need not resolve today. We note that under Illinois law, the parties to a collective-bargaining agreement may not waive the prohibition against retaliatory discharge nor may they alter a worker's rights under the state worker's

IV

The result we reach today is consistent both with the policy of fostering uniform, certain adjudication of disputes over the

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compensation scheme. *Byrd* v. *Aetna Casualty & Surety Co.*, 152 Ill. App. 3d 292, 298, 504 N. E. 2d 216, 221, app. denied, 115 Ill. 2d 539, 511 N. E. 2d 426 (1987). Before deciding whether such a state-law bar to waiver could be pre-empted under federal law by the parties to a collective-bargaining agreement, we would require "clear and unmistakable" evidence, see *Metropolitan Edison Co.* v. *NLRB*, 460 U. S. 693, 708 (1983), in order to conclude that such a waiver had been intended. No such evidence is available in this case.

[10] Thus, what we said in *Caterpillar Inc.* v. *Williams*, 482 U. S., at 394–395 (emphasis in original), see n. 5, *supra*, is relevant here:

"Caterpillar asserts that respondents' state-law contract claims are in reality completely pre-empted § 301 claims, which therefore arise under federal law. We disagree. Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.' *Electrical Workers* v. *Hechler*, 481 U. S. 851, 859, n. 3 (1987); see also *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S., at 220. Respondents allege that Caterpillar has entered into and breached *individual* employment contracts with them. Section 301 says nothing about the content or validity of individual employment contracts. It is true that respondents, bargaining unit members at the time of the plant closing, possessed substantial rights under the collective agreement, and could have brought suit under § 301. As masters of the complaint, however, they chose not to do so.

"Moreover, contrary to Caterpillar's assertion, . . . respondents' complaint is not substantially dependent upon interpretation of the collective-bargaining agreement. It does not rely upon the collective agreement indirectly, nor does it address the relationship between the individual contracts and the collective agreement. As the Court has stated, 'it would be inconsistent with congressional intent under [§ 301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.' *Allis-Chalmers Corp.*, *supra*, at 212."

meaning of collective-bargaining agreements and with cases that have permitted separate fonts of substantive rights to remain unpre-empted by other federal labor-law statutes.

First, as we explained in *Lueck*, "[t]he need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's holding in *Lucas Flour*." 471 U. S., at 219. "A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, . . . as well as eviscerate a central tenet of federal labor contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Id.*, at 220. See *Paperworkers* v. *Misco, Inc.*, 484 U. S. 29 (1987); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960). Today's decision should make clear that interpretation of collective-bargaining agreements remains firmly in the arbitral realm;[11] judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective-bargaining agreements.

Second, there is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective-bargaining agreements.

> "This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. See, *e. g.*, *McDonald* v. *West Branch*, 466 U. S. 284 (1984); *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728 (1981); *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974). Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that

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[11] Arbitrators are delegated by nearly all collective-bargaining agreements as the adjudicators of contract disputes. See *Paperworkers* v. *Misco, Inc.*, 484 U. S. 29, 36 (1987); Bureau of National Affairs, Inc., Basic Patterns in Union Contracts 37 (11th ed. 1986) ("Arbitration is called for in 99 percent of the sample contracts").

> notwithstanding the strong policies encouraging arbitration, 'different considerations apply *where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.*' *Barrentine, supra,* at 737." *Atchison, T. & S. F. R. Co.* v. *Buell,* 480 U. S. 557, 564–565 (1987) (emphasis added).

Although our comments in *Buell,* construing the scope of Railway Labor Act pre-emption, referred to independent *federal* statutory rights, we subsequently rejected a claim that federal labor law pre-empted a *state* statute providing a one-time severance benefit to employees in the event of a plant closing. In *Fort Halifax Packing Co.* v. *Coyne,* 482 U. S. 1, 21 (1987), we emphasized that "pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State." We specifically held that the Maine law in question was not pre-empted by the NLRA, "since its establishment of a minimum labor standard does not impermissibly intrude upon the collective-bargaining process." *Id.,* at 23.

The Court of Appeals "recognize[d] that § 301 does not pre-empt state anti-discrimination laws, even though a suit under these laws, like a suit alleging retaliatory discharge, requires a state court to determine whether just cause existed to justify the discharge." 823 F. 2d, at 1046, n. 17. The court distinguished those laws because Congress has affirmatively endorsed state antidiscrimination remedies in Title VII of the Civil Rights Act of 1964, 78 Stat. 241, see 42 U. S. C. §§ 2000e–5(c) and 2000e–7, whereas there is no such explicit endorsement of state workers' compensation laws. As should be plain from our discussion in Part III, *supra,* this distinction is unnecessary for determining whether § 301 pre-empts the state law in question. The operation of the antidiscrimination laws does, however, illustrate the relevant point for § 301 pre-emption analysis that the mere fact that a broad contractual protection against discriminatory—or retaliatory—discharge may provide a remedy for conduct that coincidentally violates state law does not make the existence or the contours of the state-law violation dependent upon the terms of the private contract. For even if an arbitrator should conclude that the contract does not prohibit a particular discriminatory or retaliatory discharge, that conclusion might or might not be consistent with a proper interpretation of state law. In the typical case a state tribunal could resolve either a discriminatory or retaliatory discharge claim without interpreting the "just cause" language of a collective-bargaining agreement.

V

In sum, we hold that an application of state law is pre-empted by § 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective-bargaining agreement.[12]

The judgment of the Court of Appeals is reversed.

It is so ordered.

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[12] A collective-bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled. See *Baldracchi* v. *Pratt & Whitney Aircraft Div., United Technologies Corp.*, 814 F. 2d, at 106. Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state-law claim, not otherwise pre-empted, would stand. Thus, as a general proposition, a state-law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby pre-empted. As we said in *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S., at 211, "not every dispute . . . tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 . . . ."

MEYER, COLORADO SECRETARY OF STATE, ET AL. *v.* GRANT ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 87-920. Argued April 25, 1988—Decided June 6, 1988

A Colorado statute allows a proposed state constitutional amendment to be placed on a general election ballot if its proponents can obtain the signatures of at least five percent of the total number of qualified voters on an "initiative petition" within a 6-month period, but makes it a felony to pay petition circulators. Concluding that they would need the assistance of paid personnel to obtain the required signatures within the allotted time, appellee proponents of a constitutional amendment that would remove motor carriers from the Colorado Public Utilities Commission's jurisdiction brought suit under 42 U. S. C. § 1983 against appellant state officials seeking a declaration that the statutory payment prohibition violated their First Amendment rights. The District Court upheld the statute, but the Court of Appeals ultimately reversed, holding that the statute violates the First Amendment, as made applicable to the States by the Fourteenth Amendment.

Held: The statutory prohibition against the use of paid circulators abridges appellees' right to engage in political speech in violation of the First and Fourteenth Amendments. Pp. 420-428.

(a) The statute is subject to exacting scrutiny, since the circulation of an initiative petition seeking to deregulate the Colorado trucking industry necessarily constitutes "core political speech," for which First Amendment protection is at its zenith. The statute burdens such speech in two ways: First, it limits the number of voices that will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of necessary signatures, thus limiting their ability to make the matter the focus of statewide discussion. The statute's burden on speech is not relieved by the fact that other avenues of expression remain open to appellees, since the use of paid circulators is the most effective, fundamental, and perhaps economical means of achieving direct, one-on-one communication, and appellees' right to utilize that means is itself protected by the First Amendment. Nor is the statutory burden rendered acceptable by the State's claimed authority to impose limitations on the scope of the state-created right to legislate by initiative; the power to ban initiatives entirely does not include the power to limit discussion of political issues raised in initiative petitions. *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico,* 478 U. S. 328, distinguished. Pp. 420–425.

(b) The State has failed to sustain its burden of justifying the statutory prohibition. The argument that justification is found in the State's interest in assuring that an initiative has sufficient grass roots support to be placed on the ballot is not persuasive, since that interest is adequately protected by the requirement that the specified number of signatures be obtained. Nor does the State's claimed interest in protecting the integrity of the initiative process justify the prohibition, because the State has failed to demonstrate the necessity of burdening appellees' ability to communicate in order to meet its concerns. It cannot be assumed that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer motivated entirely by an interest in having the proposition placed on the ballot. Moreover, other statutory provisions dealing expressly with the potential danger of false signatures are adequate to minimize the risk of improper circulation conduct. Pp. 425–428.

828 F. 2d 1446, affirmed.

STEVENS, J., delivered the opinion for a unanimous Court.

Maurice G. Knaizer, First Assistant Attorney General of Colorado, argued the cause for appellants. With him on the briefs were *Duane Woodard,* Attorney General, *pro se, Richard H. Forman,* Solicitor General, and *Charles B. Howe* and *Billy J. Shuman,* Deputy Attorneys General.

William C. Danks argued the cause and filed a brief for appellees.*

JUSTICE STEVENS delivered the opinion of the Court.

In Colorado the proponents of a new law, or an amendment to the State Constitution, may have their proposal placed on the ballot at a general election if they can obtain enough signatures of qualified voters on an "initiative petition" within

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*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *James J. Sandman, Steven R. Shapiro,* and *John A. Powell;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Paul D. Kamenar.*

a 6-month period. One section of the state law regulating the initiative process makes it a felony to pay petition circulators.[1] The question in this case is whether that provision is unconstitutional. The Court of Appeals for the Tenth Circuit, sitting en banc, held that the statute abridged appellees' right to engage in political speech and therefore violated the First and Fourteenth Amendments to the Federal Constitution. We agree.

I

Colorado is one of several States that permits its citizens to place propositions on the ballot through an initiative process. Colo. Const., Art. V, § 1; Colo. Rev. Stat. §§ 1–40–101 to 1–40–119 (1980 and Supp. 1987). Under Colorado law, proponents of an initiative measure must submit the measure to the State Legislative Council and the Legislative Drafting Office for review and comment. The draft is then submitted to a three-member title board, which prepares a title, submission clause, and summary. After approval of the title, submission clause, and summary, the proponents of the measure then have six months to obtain the necessary signatures, which must be in an amount equal to at least five percent of the total number of voters who cast votes for all candidates for the Office of Secretary of State at the last preceding general election. If the signature requirements are met, the petitions may be filed with the Secretary of State, and the measure will appear on the ballot at the next general election. Colo. Rev. Stat. §§ 1–40–101 to 1–40–105 (1980 and Supp. 1987).

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[1] Colorado Rev. Stat. § 1–40–110 (1980) provides:

"Any person, corporation, or association of persons who directly or indirectly pays to or receives from or agrees to pay to or receive from any other person, corporation, or association of persons any money or other thing of value in consideration of or as an inducement to the circulation of an initiative or referendum petition or in consideration of or as an inducement to the signing of any such petition commits a class 5 felony and shall be punished as provided in section 18–1–105, C. R. S. (1973)."

State law requires that the persons who circulate the approved drafts of the petitions for signature be registered voters. Colo. Const., Art. V, § 1(6). Before the signed petitions are filed with the Secretary of State, the circulators must sign affidavits attesting that each signature is the signature of the person whose name it purports to be and that, to the best of their knowledge and belief, each person signing the petition is a registered voter. Colo. Rev. Stat. § 1–40–109 (Supp. 1987). The payment of petition circulators is punished as a felony. Colo. Rev. Stat. § 1–40–110 (1980), n. 1, *supra.*

Appellees are proponents of an amendment to the Colorado Constitution that would remove motor carriers from the jurisdiction of the Colorado Public Utilities Commission. In early 1984 they obtained approval of a title, submission clause, and summary for a measure proposing the amendment and began the process of obtaining the 46,737 signatures necessary to have the proposal appear on the November 1984 ballot. Based on their own experience as petition circulators, as well as that of other unpaid circulators, appellees concluded that they would need the assistance of paid personnel to obtain the required number of signatures within the allotted time. They then brought this action under 42 U. S. C. § 1983 against the Secretary of State and the Attorney General of Colorado seeking a declaration that the statutory prohibition against the use of paid circulators violates their rights under the First Amendment.[2]

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[2] Although the November 1984 election in which appellees had first hoped to present their proposal to the citizens of Colorado is long past, we note that this action is not moot. Neither party suggests that the action is moot. Rather, both assert that the controversy between them is one capable of repetition, yet evading review.

We may exercise jurisdiction over this action if "'(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Murphy* v. *Hunt,* 455 U. S. 478, 482 (1982) *(per curiam),* quoting *Weinstein*

After a brief trial, the District Judge entered judgment upholding the statute on alternative grounds. First, he concluded that the prohibition against the use of paid circulators did not burden appellees' First Amendment rights because it did not place any restraint on their own expression or measurably impair efforts to place initiatives on the ballot.[3] The restriction on their ability to hire paid circulators to speak for them was not significant because they remained free to use their money to employ other spokesmen who could advertise their cause. Second, even assuming, *arguendo*, that the statute burdened appellees' right to engage in political speech, the District Judge concluded that the burden was justified by the State's interests in (a) making sure that an

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v. *Bradford*, 423 U. S. 147, 149 (1975) *(per curiam)*. We are satisfied that both elements are present in this case. Colorado grants the proponents of an initiative only six months in which to obtain the necessary signatures. The likelihood that a proponent could obtain a favorable ruling within that time, much less act upon such a ruling in time to obtain the needed signatures, is slim at best. Further, the initiative sought by appellees has not been enacted. Appellees, however, continue to advocate its adoption and plan future attempts to obtain the signatures necessary to place the issue on the ballot. Tr. of Oral Arg. 37. Consequently, it is reasonable to expect that the same controversy will recur between these two parties, yet evade meaningful judicial review. See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 774–775 (1978); *Moore* v. *Ogilvie*, 394 U. S. 814 (1969).

[3] In support of its conclusion that the prohibition against the use of paid circulators did not inhibit the placement of initiative measures on the general ballot, the District Court compared Colorado's experience with that of 20 States which have an initiative process but do not prohibit paid circulators. It noted that since 1910, Colorado has ranked fourth in the total number of initiatives placed on the ballot. This statistic, however, does not reject the possibility that even more petitions would have been successful if paid circulators had been available, or, more narrowly, that these appellees would have had greater success if they had been able to hire extra help. As the District Court itself noted, "the evidence indicates [appellees'] purposes would be enhanced if the corps of volunteers could be augmented by a cadre of paid workers." 741 F. 2d 1210, 1212 (CA10 1984) (Appendix).

initiative measure has a sufficiently broad base to warrant its placement on the ballot, and (b) protecting the integrity of the initiative process by eliminating a temptation to pad petitions.

A divided panel of the Court of Appeals affirmed for the reasons stated by the District Court. After granting rehearing en banc, however, the court reversed. The en banc majority concluded that the record demonstrated that petition circulators engage in the communication of ideas while they are obtaining signatures and that the available pool of circulators is necessarily smaller if only volunteers can be used.

> "Thus, the effect of the statute's absolute ban on compensation of solicitors is clear. It impedes the sponsors' opportunity to disseminate their views to the public. It curtails the discussion of issues that normally accompanies the circulation of initiative petitions. And it shrinks the size of the audience that can be reached. . . . In short, like the campaign expenditure limitations struck down in *Buckley*, the Colorado statute imposes a direct restriction which 'necessarily reduces the quantity of expression . . . .' *Buckley* [v. *Valeo*], 424 U. S. [1,] 19 [(1976)]." 828 F. 2d 1446, 1453–1454 (CA10 1987) (citations omitted).

The Court of Appeals then rejected the State's asserted justifications for the ban. It first rejected the suggestion that the ban was necessary either to prevent fraud or to protect the public from circulators that might be too persuasive:

> "The First Amendment is a value-free provision whose protection is not dependent on 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' *NAACP* v. *Button*, [371 U. S. 415, 445 (1963)]. 'The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . . In this field every person must be his

> own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.' *Thomas* v. *Collins*, [323 U. S. 516, 545 (1945)] (Jackson, J., concurring)." *Id.*, at 1455.

The court then rejected the suggestion that the ban was needed to assure that the initiative had a broad base of public support because, in the court's view, that interest was adequately protected by the requirement that the petition be signed by five percent of the State's eligible voters. Finally, the Court of Appeals rejected an argument advanced by a dissenting judge that since Colorado had no obligation to afford its citizens an initiative procedure, it could impose this condition on its use. Having decided to confer the right, the State was obligated to do so in a manner consistent with the Constitution because, unlike *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U. S. 328 (1986), which involved only commercial speech, this case involves "core political speech."

II

We fully agree with the Court of Appeals' conclusion that this case involves a limitation on political expression subject to exacting scrutiny. *Buckley* v. *Valeo*, 424 U. S. 1, 45 (1976). The First Amendment provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." The Fourteenth Amendment makes that prohibition applicable to the State of Colorado. As we explained in *Thornhill* v. *Alabama*, 310 U. S. 88, 95 (1940), "[t]he freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State."

Unquestionably, whether the trucking industry should be deregulated in Colorado is a matter of societal concern that appellees have a right to discuss publicly without risking criminal sanctions. "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Id.*, at 101–102. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). Appellees seek by petition to achieve political change in Colorado; their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment.

The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it.[4] Thus, the circulation of a petition involves the type of

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[4] The record in this case demonstrates that the circulation of appellees' petition involved political speech. Paul Grant, one of the appellees, testified about the nature of his conversations with voters in an effort to get them to sign the petition:

"[T]he way we go about soliciting signatures is that you ask the person—first of all, you interrupt the person in their walk or whatever they are doing. You intrude upon them and ask them, "Are you a registered voter?

. . . . .

"If you get a yes, then you tell the person your purpose, that you are circulating a petition to qualify the issue on the ballot in November, and tell them what about, and they say, 'Please let me know a little bit more.' Typically, that takes maybe a minute or two, the process of explaining interactive communication concerning political change that is appropriately described as "core political speech."[5]

The refusal to permit appellees to pay petition circulators restricts political expression in two ways: First, it limits the number of voices who will convey appellees' message and the

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to the persons that you are trying to put the initiative on the ballot to exempt Colorado transportation from [State Public Utilities Commission] regulations.

"Then you ask the person if they will sign your petition. If they hesitate, you try to come up with additional arguments to get them to sign.

. . . . .

"[We try] to explain the not just deregulation in this industry, that it would free up to industry from being cartelized, allowing freedom from moral choices, price competition for the first time, lowering price costs, which we estimate prices in Colorado to be $150 million a year in monopoly benefits. We have tried to convey the unfairness and injustice of the existing system, where some businesses are denied to go into business simply to protect the profits of existing companies.

"We tried to convey the unfairness of the existing system, which has denied individuals the right to start their own businesses. In many cases, individuals have asked for an authority and been turned down because huge corporate organizations have opposed them." 2 Record 10–11.

This testimony provides an example of advocacy of political reform that falls squarely within the protections of the First Amendment.

[5] Our recognition that the solicitation of signatures for a petition involves protected speech follows from our recognition in *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620 (1980), that the solicitation of charitable contributions often involves speech protected by the First Amendment and that any attempt to regulate solicitation would necessarily infringe that speech:

"Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Id.*, at 632.

hours they can speak and, therefore, limits the size of the audience they can reach.[6] Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion. The Colorado Supreme Court has itself recognized that the prohibition against the use of paid circulators has the inevitable effect of reducing the total quantum of speech on a public issue. When called upon to consider the constitutionality of the statute at issue here in another context in *Urevich* v. *Woodard*, 667 P. 2d 760, 763 (1983), that court described the burden the statute imposes on First Amendment expression:

> "As mentioned previously, statutes that limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed. That the statute in question acts as a limitation on ACORN's ability to circulate petitions cannot be doubted. We can take judicial notice of the fact that it is often more difficult to get people to work without compensation than it is to get them to work for pay. As the dissent in *State* v. *Conifer Enterprises, Inc.*, 82 Wash. 2d 94, [104,] 508 P. 2d 149[, 155] (1973) (Rosellini, J., dissenting), observed:
>
> "'The securing of sufficient signatures to place an initiative measure on the ballot is no small undertaking. Unless the proponents of a measure can find a large number of volunteers, they must hire persons to solicit signatures or abandon the project. I think we can take judicial notice of the fact that the solicitation of signatures on petitions is work. It is time-consuming and it is tire-

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[6] Paul Grant testified that compensation resulted in more people being "able and willing" to circulate petitions. 2 Record 19–20. As he succinctly concluded: "[M]oney either enables people to forego leaving a job, or enables them to have a job." *Ibid.*

> some—so much so that it seems that few but the young have the strength, the ardor and the stamina to engage in it, unless, of course, there is some remuneration.'"

Appellants argue that even if the statute imposes some limitation on First Amendment expression, the burden is permissible because other avenues of expression remain open to appellees and because the State has the authority to impose limitations on the scope of the state-created right to legislate by initiative. Neither of these arguments persuades us that the burden imposed on appellees' First Amendment rights is acceptable.

That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection. Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. That it leaves open "more burdensome" avenues of communication, does not relieve its burden on First Amendment expression. *FEC* v. *Massachusetts Citizens For Life, Inc.*, 479 U. S. 238 (1986). Cf. *Citizens Against Rent Control* v. *Berkeley*, 454 U. S. 290, 296, 299 (1981). The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.

Relying on *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U. S. 328 (1986), Colorado contends that because the power of the initiative is a state-created right, it is free to impose limitations on the exercise of that right. That reliance is misplaced. In *Posadas* the Court concluded that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." *Id.*, at 345–346. The Court of Appeals quite properly pointed out the logical flaw in Colorado's attempt to draw an analogy between the present case and *Posadas*. The decision in *Posadas* does not suggest that "the power to ban casino gambling entirely would include the power to ban public discussion of legislative proposals regarding the legalization and advertising of casino gambling." 828 F. 2d, at 1456. Thus it does not support the position that the power to ban initiatives entirely includes the power to limit discussion of political issues raised in initiative petitions. And, as the Court of Appeals further observed:

> "*Posadas* is inapplicable to the present case for a more fundamental reason—the speech restricted in *Posadas* was merely 'commercial speech which does "no more than propose a commercial transaction . . . ."' *Posadas*, [478 U. S., at 340] (quoting *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 762 (1976)). . . . Here, by contrast, the speech at issue is 'at the core of our electoral process and of the First Amendment freedoms,' *Buckley*, 424 U. S., at 39 (quoting *Williams* v. *Rhodes*, 393 U. S. 23, 32 (1968))—an area of public policy where protection of robust discussion is at its zenith." *Id.*, at 1456–1457.

We agree with the Court of Appeals' conclusion that the statute trenches upon an area in which the importance of First Amendment protections is "at its zenith." For that reason the burden that Colorado must overcome to justify this criminal law is well-nigh insurmountable.

III

We are not persuaded by the State's arguments that the prohibition is justified by its interest in making sure that an initiative has sufficient grass roots support to be placed on the ballot, or by its interest in protecting the integrity of the initiative process. As the Court of Appeals correctly held, the former interest is adequately protected by the requirement that no initiative proposal may be placed on the ballot unless the required number of signatures has been obtained. *Id.*, at 1455.[7]

The State's interest in protecting the integrity of the initiative process does not justify the prohibition because the State has failed to demonstrate that it is necessary to burden appellees' ability to communicate their message in order to meet its concerns. The Attorney General has argued that the petition circulator has the duty to verify the authenticity of signatures on the petition and that compensation might provide the circulator with a temptation to disregard that duty. No evidence has been offered to support that speculation, however, and we are not prepared to assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.

Other provisions of the Colorado statute deal expressly with the potential danger that circulators might be tempted to pad their petitions with false signatures. It is a crime to forge a signature on a petition, Colo. Rev. Stat. § 1–13–106 (1980), to make false or misleading statements relating to a petition, Colo. Rev. Stat. § 1–40–119 (Supp. 1987), or to pay someone to sign a petition, Colo. Rev. Stat. § 1–40–110 (1980). Further, the top of each page of the petition must bear a statement printed in red ink warning potential signatories that it is a felony to forge a signature on a petition or to sign the petition when not qualified to vote and admonishing signatories not to sign the petition unless they have read and understand the proposed initiative.[8] These provisions seem adequate to the task of minimizing the risk of improper conduct in the circulation of a petition, especially since the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting. Cf. *First National Bank of Boston* v. *Bellotti*, 435

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[7] Colorado also seems to suggest that it is permissible to mute the voices of those who can afford to pay petition circulators. See Brief for Appellants 17. "But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley* v. *Valeo*, 424 U. S. 1, 48–49 (1976). The concern that persons who can pay petition circulators may succeed in getting measures on the ballot when they might otherwise have failed cannot defeat First Amendment rights. As we said in *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 790–791, paid advocacy "may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it . . . . '[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .' *Buckley*, 424 U. S., at 48–49. . . . [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." Cf. *Brown* v. *Hartlage*, 456 U. S. 45, 60 (1982) ("The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech").

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[8] Section 1–40–106 provides in part:

"(1) At the top of each page of every initiative or referendum petition shall be printed, in plain red letters no smaller than the impression of ten-point, boldface type, the following:

"WARNING
"IT IS A FELONY:

"For anyone to sign any initiative or referendum petition with any name other than his or her own or to knowingly sign his or her name more than once for the same measure or to sign such petition when not a qualified elector.

"DO NOT SIGN THIS PETITION UNLESS YOU ARE A
"QUALIFIED ELECTOR

"TO BE A QUALIFIED ELECTOR, YOU MUST BE:

"(a) At least eighteen years of age.

"(b) A citizen of the United States.

"(c) A resident of the state of Colorado and have resided in the state at least thirty-two days.

"(d) A resident of the precinct in which you live for at least thirty-two days.

"Do not sign this petition unless you have read or had read to you the proposed initiative or referred measure or the summary of an initiated measure in its entirety and understand its meaning."

U. S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue").

"[L]egislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Buckley* v. *Valeo*, 424 U. S., at 50. That principle applies equally to "the discussion of political policy generally or advocacy of the passage or defeat of legislation." *Id.*, at 48. The Colorado statute prohibiting the payment of petition circulators imposes a burden on political expression that the State has failed to justify. The Court of Appeals correctly held that the statute violates the First and Fourteenth Amendments. Its judgment is therefore affirmed.

It is so ordered.

McCOY *v.* COURT OF APPEALS OF WISCONSIN, DISTRICT 1

APPEAL FROM THE SUPREME COURT OF WISCONSIN

No. 87-5002. Argued January 20, 1988—Decided June 6, 1988

Under *Anders* v. *California,* 386 U. S. 738, if court-appointed appellate counsel wishes to withdraw on the ground that his or her client's appeal is wholly frivolous, he or she must include with the withdrawal motion "a brief referring to anything in the record that might arguably support the appeal." A Wisconsin Supreme Court Rule essentially restates this requirement, but also requires that the brief include "a discussion of why the issue lacks merit." Believing that his client's state-court appeal from felony convictions was frivolous, but being unwilling to include in his withdrawal brief the discussion required by the Rule, appellant's court-appointed counsel, after an unsuccessful challenge in the state intermediate appellate court, filed an original action in the State Supreme Court challenging the discussion requirement on the grounds that it is inconsistent with *Anders* and forces counsel to violate his or her client's Sixth Amendment rights. The court upheld the requirement.

Held: The discussion requirement—as construed by the State Supreme Court to require a brief statement of why particular cases, statutes, or facts in the record lead the attorney to believe that the appeal lacks merit—is constitutional under the Sixth and Fourteenth Amendments. The discussion requirement merely goes one step further than the minimum requirements stated in *Anders*, and satisfies the same objectives that those requirements serve: assuring the appellate court that the attorney has protected his or her indigent client's constitutional rights by diligently and thoroughly searching the record for any arguable claim that might support the appeal, and allowing the court to determine whether counsel's frivolousness conclusion is correct. Because counsel may discover previously unrecognized aspects of the law in the process of preparing his or her discussion, the discussion requirement provides an additional safeguard against mistaken frivolousness conclusions. It may forestall some motions to withdraw and will assist the court in passing on the soundness of counsel's conclusion that the appeal is frivolous. It is settled that an attorney can advise a court that an appeal is frivolous without impairing his or her client's constitutional rights. Explaining the basis for the frivolousness conclusion does not burden the rights to effective representation or to due process on appeal any more than does stating the bald conclusion. The Rule does not diminish any right a defendant may have under state law to an appeal on the merits, since once the court is satisfied both that counsel has been diligent and that the appeal is frivolous, federal concerns are satisfied and the case may be disposed of in accordance with state law. Furthermore, the discussion requirement does not diminish the attorney's obligations as an advocate, since his or her duty to his or her client is fulfilled once he or she has conducted a zealous review of the record. Pp. 440–444.

137 Wis. 2d 90, 403 N. W. 2d 449, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 445. KENNEDY, J., took no part in the consideration or decision of the case.

Louis B. Butler, Jr., argued the cause and filed briefs for appellant.

Stephen W. Kleinmaier, Assistant Attorney General of Wisconsin, argued the cause for appellee. With him on the brief was *Donald J. Hanaway*, Attorney General.*

JUSTICE STEVENS delivered the opinion of the Court.

Like *Anders* v. *California*, 386 U. S. 738 (1967), this case concerns the scope of court-appointed appellate counsel's duty to an indigent client after counsel has conscientiously determined that the indigent's appeal is wholly frivolous. In *Anders*, we held that counsel could not withdraw by simply advising the court of his or her conclusion, but must include with the request to withdraw "a brief referring to anything in the record that might arguably support the appeal." *Id.*, at 744. The Wisconsin Supreme Court has adopted a Rule that requires such a brief also to include "a discussion of why the issue lacks merit."[1] Appellant challenged the constitution-

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**Kim Robert Fawcett, John A. Powell, Steven R. Shapiro,* and *Larry W. Yackle* filed a brief for the National Legal Aid and Defender Association et al. as *amici curiae*.

[1] Rule 809.32, Wis. Rules of App. Proc., provides:

"Rule (No merit reports) (1). If an attorney appointed under s.809.30 or ch. 977 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the ality of the Rule in the Wisconsin Supreme Court. Over the dissent of three of its justices, the court upheld the Rule, rejecting appellant's contentions that the Rule is inconsistent with *Anders* and that it forces counsel to violate his or her client's Sixth Amendment rights. *Wisconsin ex rel. McCoy* v. *Wisconsin Court of Appeals*, 137 Wis. 2d 90, 403 N. W. 2d 449 (1987). We noted probable jurisdiction, 484 U. S. 813 (1987), and now affirm.

I

Appellant is indigent. A Wisconsin trial judge found him guilty of abduction and sexual assault and sentenced him to prison for 12 years. He has filed an appeal from that conviction and an attorney has been appointed to represent him. After studying the case, the attorney advised him that further appellate proceedings would be completely useless and that he had three options: He could voluntarily dismiss the appeal; he could go forward without a lawyer; or he could authorize the attorney to file a brief that would present the strongest arguments the lawyer could make in support of the

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meaning of Anders v. California, 386 U. S. 738 (1967), the attorney shall file with the court of appeals 3 copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant and shall file a statement in the court of appeals that service has been made upon the defendant. The defendant may file a response to the brief within 30 days of service.

"(2) The attorney shall file in the trial court a notice of appeal of the judgment of conviction and of any order denying a postconviction motion. The clerk of the trial court shall transmit the record in the case to the court pursuant to s.809.15. The no merit brief and notice of appeal must be filed within 180 days of the service upon the defendant of the transcript under s.809.30(1)(e).

"(3) In the event the court of appeals finds that further appellate proceedings would be frivolous and without any arguable merit, the court of appeals shall affirm the judgment of conviction and the denial of any postconviction motion and relieve the attorney of further responsibility in the case. The attorney shall advise the defendant of the right to file a petition for review to the supreme court under s.809.62."

appeal but would also advise the court of the lawyer's conclusion that the appeal is frivolous. Appellant selected the third option.

Appellant's counsel then prepared a brief that can fairly be characterized as schizophrenic. In his role as an advocate for appellant, counsel stated the facts, advanced four arguments for reversal, and prayed that the conviction be set aside. In his role as an officer of the court, counsel stated that further appellate proceedings on behalf of his client "would be frivolous and without any arguable merit," App. 14, and prayed that he be permitted to withdraw, *id.*, at 27. Thus, in the same document, the lawyer purported to maintain that there were arguments warranting a reversal and also that those arguments were wholly without merit. The brief did not contain an explanation of the reasons for counsel's conclusion. Instead, counsel explained why he believed that it would be both unethical and contrary to *Anders* to discuss the reasons why the appeal lacked merit.[2] Because the brief did not comply with the discussion requirement in Rule 809.32(1), the court ordered it stricken and directed counsel to submit a conforming brief within 15 days. App. 30.

Appellant's counsel did not comply with that order. Instead, after unsuccessfully attempting to obtain a ruling on the constitutionality of the Rule in the intermediate appellate court, he filed an original action in the Wisconsin Supreme Court seeking to have the discussion requirement in Rule

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[2] The brief stated, in part:

"Counsel would no longer be an advocate, as required by *Anders*, but would be in the awkward position of arguing why his client's appeal lacks merit. This would be contrary to the mandate of *Anders* that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, defendant and this attorney submit that a discussion of why any issue lacks merit would violate the sixth amendment." App. 15–16.

809.32(1) declared unconstitutional.[3] The Supreme Court agreed with portions of appellant's argument, but rejected his ultimate conclusion. The court reaffirmed its acceptance of the principle that appointed counsel have the same obligations as paid counsel to provide their clients with adequate representation,[4] and it agreed that the *Anders* opinion had not sanctioned a discussion requirement.[5] Moreover, the court also agreed that it is ultimately the responsibility of the court—and not of counsel—to decide whether an appeal is wholly frivolous. It explained, however, that the discussion requirement in the Wisconsin Rule assists the court in making that determination:

> "When the court has before it a reasoned summary of the law militating against further appellate proceedings, it can be assured that the attorney has made an inquiry into the relative merits of the appeal and that the attorney's withdrawal request is valid and grounded in fact and in the law." 137 Wis. 2d, at 101, 403 N. W. 2d, at 454.

The court noted that because its procedures for handling frivolous appeals were far removed from the simple statement of counsel's conclusion that this Court condemned in *Anders*, they did not raise the "quality and equality of attorney representation" concerns that underlay our decision in *Anders*. 137 Wis. 2d, at 101–102, 403 N. W. 2d, at 454. The court also pointed out that the Rule does not require an attorney to argue against his or her client; rather it merely requires the attorney to fulfill his or her duty to the courts.[6] Accordingly, the court upheld the Rule.

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[3] In his request for a declaratory judgment and a writ of prohibition, appellant asked the Supreme Court to "strike that portion of rule 809.32(1) which requires that the attorney provide reasons why the issue lacks merit as unconstitutional, prohibit the court of appeals from striking the brief already filed, and prohibit the court of appeals from requiring petitioner to provide reasons why relator's appeal lacks merit in compliance with Rule 809.32(1)." *Id.*, at 54.

[4] "We have previously recognized, in a case decided prior to the enactment of the no-merit rule, that the *Anders* analysis compels appointed counsel to 'perform his duties as adequately as paid counsel so the indigent will not be deprived of adequate representation because of his indigency.' *Cleghorn* v. *State*, 55 Wis. 2d 466, 471, 198 N. W. 2d 577 (1972). We reaffirm our belief in that principle." 137 Wis. 2d, at 97, 403 N. W. 2d, at 452.

[5] "While *Anders* does not sanction the use of the discussion requirement, it does not proscribe it, either." *Ibid.*

The dissenting justices expressed the view that the discussion requirement was not necessary[7] and that it improperly required defense counsel to assume the role of either an *amicus curiae*, or even an adversary, instead of acting exclusively as an advocate for the client.

In this Court appellant makes two basic attacks on the Rule. He argues that it discriminates against the indigent appellant and that it violates his right to effective representation by an advocate. Both arguments rest largely on the assumption that retained counsel will seldom, if ever, advise an appellate court that he or she has concluded that a client's appeal is meritless, or provide the court with a discussion of the reasons supporting such a conclusion. In determining whether Wisconsin's Rule requiring appointed counsel to provide an appellate court with such advice is constitutional, it is appropriate to begin by restating certain propositions established by our previous decisions concerning the right to counsel and the obligations of both paid and appointed counsel.

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[6] "[W]e do not believe the rule requires an attorney to argue against the client; rather, we believe the rule requires an attorney to fulfill a duty that co-exists with the duty owed to the client—that duty which is owed to the court. The court will be better equipped to make the correct decision about the potential merits of the appeal if it has before it not only the authorities which might favor an appeal, but also the authorities which might militate against it." *Id.*, at 100–101, 403 N. W. 2d, at 454.

[7] "Appointed appellate criminal defense counsel's request to withdraw in itself puts the court on notice that counsel considers the arguments in the no-merit brief frivolous. Once raised, frivolous arguments by their very nature should not be difficult for a court to evaluate on its own without counsel supplying case authorities or factual references which militate against the appeal." *Id.*, at 106, 403 N. W. 2d, at 456 (Abrahamson, J., dissenting).

II

A State's enforcement of its criminal laws must comply with the principles of substantial equality and fair procedure that are embodied in the Fourteenth Amendment. The Sixth Amendment's requirement that "the accused shall enjoy the right to have the Assistance of Counsel for his defense" is therefore binding on the States. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). As we explained in *Gideon*, "in our adversary system of criminal justice, any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.*, at 344. It is therefore settled law that an indigent defendant has the same right to effective representation by an active advocate as a defendant who can afford to retain counsel of his or her choice. The "guiding hand of counsel," see *Powell* v. *Alabama*, 287 U. S. 45, 68–69 (1932), is essential for the evaluation of the prosecution's case, the determination of trial strategy, the possible negotiation of a plea bargain and, if the case goes to trial, making sure that the prosecution can prove the State's case with evidence that was lawfully obtained and may lawfully be considered by the trier of fact.

At the trial level, defense counsel's view of the merits of his or her client's case never gives rise to a duty to withdraw. That a defense lawyer may be convinced before trial that any defense is wholly frivolous does not qualify his or her duty to the client or to the court. Ethical considerations and rules of court prevent counsel from making dilatory motions, adducing inadmissible or perjured evidence, or advancing frivolous or improper arguments, but those constraints do not qualify the lawyer's obligation to maintain that the stigma of guilt may not attach to the client until the presumption of innocence has been overcome by proof beyond a reasonable doubt.

After a judgment of conviction has been entered, however, the defendant is no longer protected by the presumption of innocence. If a convicted defendant elects to appeal, he retains the Sixth Amendment right to representation by competent counsel, but he must assume the burden of convincing an appellate tribunal that reversible error occurred at trial. Although trial counsel may remain silent and force the prosecutor to prove every element of the offense, counsel for an appellant cannot serve the client's interest without asserting specific grounds for reversal. In so doing, however, the lawyer may not ignore his or her professional obligations. Neither paid nor appointed counsel may deliberately mislead the court with respect to either the facts or the law, or consume the time and the energies of the court or the opposing party by advancing frivolous arguments. An attorney, whether appointed or paid, is therefore under an ethical obligation to refuse to prosecute a frivolous appeal.[8]

> "A lawyer, after all, has no duty, indeed no right, to pester a court with frivolous arguments, which is to say arguments that cannot conceivably persuade the court, so if he believes in good faith that there are no other arguments that he can make on his client's behalf he is honor-bound to so advise the court and seek leave to withdraw as counsel." *United States* v. *Edwards*, 777 F. 2d 364, 365 (CA7 1985).

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[8] "See ABA Standards for Criminal Justice, Commentary to 4—3.9 (2d ed. 1980) ('No lawyer, whether assigned by the court, part of a legal aid or defender staff, or privately retained or paid, has any duty to take any steps or present dilatory or frivolous motions or any actions that are unfounded according to the lawyer's informed professional judgment. On the contrary, to do so is unprofessional conduct'); ABA Standing Committee on Ethics and Professional Responsibility, Informal Opinion 955, Obligation to Take Criminal Appeal, reprinted in 2 Informal Ethics Opinions 955–956 (1975) (like court-appointed lawyer, private counsel 'ethically, should not clog the courts with frivolous motions or appeals'). See also *Nickols* v. *Gagnon*, 454 F. 2d 467, 472 (CA7 1971)." *Polk County* v. *Dodson*, 454 U. S. 312, 323–324, n. 14 (1981).

When retained counsel concludes that an appeal would be frivolous, he or she has a duty to advise the client that it would be a waste of money to prosecute the appeal and that it would be unethical for the lawyer to go forward with it. When appointed counsel comes to the same conclusion, the same duty to withdraw arises. Appointed counsel, however, is presented with a dilemma because withdrawal is not possible without leave of court, and advising the court of counsel's opinion that the appeal is frivolous would appear to conflict with the advocate's duty to the client. It is well settled, however, that this dilemma must be resolved by informing the court of counsel's conclusion. As we stated three decades ago:

> "If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied." *Ellis* v. *United States*, 356 U. S. 674, 675 (1958).

We reaffirmed this basic proposition in *Anders.*[9] Moreover, the fact that an appointed appellate lawyer may find it necessary to file a motion to withdraw because he or she has concluded that an appeal is frivolous does not indicate that the indigent defendant has received less effective representation than the affluent. We categorically rejected that suggestion in *Polk County* v. *Dodson*, 454 U. S. 312 (1981). As Justice Powell explained in his opinion for the Court:

> "Dodson's argument assumes that a private lawyer would have borne no professional obligation to refuse to

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[9] "Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he *should* so advise the court and request permission to withdraw." 386 U. S., at 744 (emphasis added).

> prosecute a frivolous appeal. This is error. In claiming that a public defender is peculiarly subject to divided loyalties, Dodson confuses a lawyer's ethical obligations to the judicial system with an allegiance to the adversary interests of the State in a criminal prosecution. Although a defense attorney has a duty to advance all colorable claims and defenses, the canons of professional ethics impose limits on permissible advocacy. It is the obligation of any lawyer—whether privately retained or publicly appointed—not to clog the courts with frivolous motions or appeals. Dodson has no legitimate complaint that his lawyer refused to do so." *Id.*, at 323 (footnote omitted).

In *Anders* we squarely held that the principle of substantial equality is not compromised when appointed counsel files a "no merit" brief even though such briefs are seldom, if ever, filed by retained counsel. As we stated in *Douglas* v. *California*, 372 U. S. 353, 357 (1963), "[a]bsolute equality is not required."

The principle of substantial equality does, however, require that appointed counsel make the same diligent and thorough evaluation of the case as a retained lawyer before concluding that an appeal is frivolous. Every advocate has essentially the same professional responsibility whether he or she accepted a retainer from a paying client or an appointment from a court. The appellate lawyer must master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal. In preparing and evaluating the case, and in advising the client as to the prospects for success, counsel must consistently serve the client's interest to the best of his or her ability. Only after such an evaluation has led counsel to the conclusion that the appeal is "wholly frivolous"[10] is counsel justified in making a motion to withdraw. This is the central teaching of *Anders.*[11]

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[10] The terms "wholly frivolous" and "without merit" are often used interchangeably in the *Anders*-brief context. Whatever term is used to describe the conclusion an attorney must reach as to the appeal before

In *Anders* we held that a motion to withdraw must be accompanied by "a brief referring to anything in the record that might arguably support the appeal." 386 U. S., at 744. That requirement was designed to provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their clients' appeals to the best of their ability. The *Anders* requirement assures that indigent defendants have the benefit of what wealthy defendants are able to acquire by purchase—a diligent and thorough review of the record and an identification of any arguable issues revealed by that review.[12] Thus, the *Anders* brief assists the court in making the critical determination whether the appeal is indeed so frivolous that counsel should be permitted to withdraw.[13]

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requesting to withdraw and the court must reach before granting the request, what is required is a determination that the appeal lacks any basis in law or fact.

[11] The question presented by Anders' certiorari petition read as follows: "May a State appellate court refuse to provide counsel to brief and argue an indigent criminal defendant's first appeal as of right on the basis of a conclusory statement by the appointed attorney on appeal that the case has no merit and that he will file no brief?" See Brief for Petitioner in *Anders* v. *California*, O. T. 1966, No. 98, p. 2.

The court gave a negative answer to that question. A "conclusory statement" by counsel is not sufficient to justify an appellate court's refusal to provide counsel to argue an indigent defendant's appeal. For the court—not counsel—must "decide whether the [appeal] is wholly frivolous," 386 U. S., at 744, and counsel must provide the court with sufficient guidance to make sure that counsel's appraisal of the case is correct.

[12] Although a wealthy defendant cannot pay to have frivolous arguments presented to the court unless he or she locates an unscrupulous attorney, such a defendant can pay to have a competent attorney examine the trial court record, search for error, and explain to him or her the strongest arguments that could be made in support of an appeal.

[13] It is essential to keep in mind that the so-called "*Anders* brief" is not expected to serve as a substitute for an advocate's brief on the merits, for

III

The question whether the Wisconsin Rule is consistent with our holding in *Anders* must be answered in light of the Wisconsin Supreme Court's explanation of the Rule's requirements:

> "We interpret the discussion rule to require a statement of reasons why the appeal lacks merit which might include, for example, a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching that same result. We do not contemplate the discussion rule to require an attorney to engage in a protracted argument in favor of the conclusion reached; rather, we view the rule as an attempt to provide the court with 'notice' that there are facts on record or cases or statutes on point which would seem to compel a conclusion of no merit." 137 Wis. 2d, at 100, 403 N. W. 2d, at 454.

As so construed, the Rule appears to require that the attorney cite the principal cases and statutes and the facts in the record that support the conclusion that the appeal is meritless. The Rule also requires a brief statement of why these citations lead the attorney to believe the appeal lacks merit. The former requirement is, as far as the Federal Constitution is concerned, entirely unobjectionable. Attorneys are obligated to act with candor in presenting claims for judicial resolution. The rules of ethics already prescribe circumstances in which an attorney must disclose facts and law contrary

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it would be a strange advocate's brief that would contain a preface advising the court that the author of the brief is convinced that his or her arguments are frivolous and wholly without merit. Rather, the function of the brief is to enable the court to decide whether the appeal is so frivolous that the defendant has no federal right to have counsel present his or her case to the court.

to his or her client's interests.[14] That the Wisconsin Rule requires counsel also to do so when seeking to withdraw on the ground that the appeal is frivolous does not deny the client effective assistance of counsel any more than the rules of ethics do.

The aspect of the Rule that has provoked the concern of counsel for petitioner and other members of the defense bar is that which calls for the attorney to reveal the basis for his or her judgment.[15] Although neither appellant nor *amici* supporting appellant debate the propriety of allowing defense counsel to satisfy his or her ethical obligations to the court by asserting his or her belief that the appeal is frivolous and seeking to withdraw, they do contend that requiring the attorney to assert the basis for this conclusion violates the client's Sixth and Fourteenth Amendment rights and is contrary to *Anders*. We disagree.

The Wisconsin Rule is fully consistent with the objectives that are served by requiring that a motion to withdraw be accompanied by a brief referring to all claims that might arguably support the appeal. Unlike the typical advocate's brief in a criminal appeal, which has as its sole purpose the persuasion of the court to grant relief to the defendant, the *Anders* brief is designed to assure the court that the indigent defendant's constitutional rights have not been violated. To satisfy federal constitutional concerns, an appellate court faces two interrelated tasks as it rules on counsel's motion to withdraw. First, it must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal. Second, it must determine whether counsel has correctly concluded that the appeal is frivolous. Because the mere statement of such a conclusion by counsel in *Anders* was insufficient to allow the court to make the required determinations, we held that the attorney was required to submit for the court's consideration references to anything in the record that might arguably support the appeal. Wisconsin's Rule merely requires that the attorney go one step further. Instead of relying on an unexplained assumption that the attorney has discovered law or facts that completely refute the arguments identified in the brief, the Wisconsin court requires additional evidence of counsel's diligence. This requirement furthers the same interests that are served by the minimum requirements of *Anders*. Because counsel may discover previously unrecognized aspects of the law in the process of preparing a written explanation for his or her conclusion, the discussion requirement provides an additional safeguard against mistaken conclusions by counsel that the strongest arguments he or she can find are frivolous. Just like the references to favorable aspects of the record required by *Anders*, the discussion requirement may forestall some motions to withdraw and will assist the court in passing on the soundness of the lawyer's conclusion that the appeal is frivolous.[16]

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[14] Rule 3.3 of the ABA Model Rules of Professional Conduct (1984) provides in part:

"CANDOR TOWARD THE TRIBUNAL

"(a) A lawyer shall not knowingly:

"(1) make a false statement of material fact or law to a tribunal;

"(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

"(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

"(4) offer evidence that the lawyer knows to be false."

The commentary to the Rule explains, "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." See also G. Hazard & W. Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 352 (1985) ("The duty to reveal adverse precedent is well established").

[15] See Brief for the National Legal Aid and Defender Association et al. as *Amici Curiae* 6.

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[16] Anders argued in his brief that counsel should be required to state why he or she thought the appeal frivolous. He referred with approval in his

The Rule does not place counsel in the role of *amicus curiae.* In *Anders* petitioner argued that California's rule allowing counsel to withdraw on the basis of a conclusory statement that the appeal was meritless posed the danger that some counsel might seek to withdraw not because they thought the appeal frivolous but because, seeing themselves as friends of the court, they thought after weighing the probability of success against the time burdens on the court and the attorney if full arguments were presented that it would be best not to pursue the appeal. Brief for Petitioner in *Anders* v. *California*, O. T. 1966, No. 98, p. 13. We agreed that the California rule might improperly encourage counsel to consider the burden on the court in determining whether to prosecute an appeal. Wisconsin's Rule requiring the attorney to outline why the appeal is frivolous obviously does not pose this danger.

We also do not find that the Wisconsin Rule burdens an indigent defendant's right to effective representation on appeal or to due process on appeal. We have already rejected the contention that by filing a motion to withdraw on the ground that the appeal is frivolous counsel to an indigent defendant denies his or her client effective assistance of counsel or provides a lesser quality of representation than an affluent defendant could obtain. If an attorney can advise the court of his or her conclusion that an appeal is frivolous without impairment of the client's fundamental rights, it must follow that no constitutional deprivation occurs when the attorney explains the basis for that conclusion. A supported conclusion that the appeal is frivolous does not implicate Sixth or Fourteenth Amendment concerns to any greater extent than does a bald conclusion.

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brief to the practice of the United States Court of Appeals for the District of Columbia Circuit, which required counsel to "convince the court that the issues are truly 'frivolous' . . . in a documented memorandum which analyzes the facts and applicable law." Brief for Petitioner in *Anders* v. *California*, O. T. 1966, No. 98, p. 16.

The *Anders* brief is not a substitute for an advocate's brief on the merits. As explained above, it is a device for assuring that the constitutional rights of indigent defendants are scrupulously honored. The Wisconsin Rule does no injury to that purpose, nor does it diminish any right a defendant may have under state law to an appeal on the merits. Once the court is satisfied both that counsel has been diligent in examining the record for meritorious issues and that the appeal is frivolous, federal concerns are satisfied and the case may be disposed of in accordance with state law. Of course, if the court concludes that there are nonfrivolous issues to be raised, it must appoint counsel to pursue the appeal and direct that counsel to prepare an advocate's brief before deciding the merits.

It bears emphasis that the attorney's obligations as an advocate are not diminished by the additional requirement imposed by the Wisconsin Rule. The attorney must still provide his or her client precisely the services that an affluent defendant could obtain from paid counsel—a thorough review of the record and a discussion of the strongest arguments revealed by that review. In searching for the strongest arguments available, the attorney must be zealous and must resolve all doubts and ambiguous legal questions in favor of his or her client. Once that obligation is fulfilled, however, and counsel has determined that the appeal is frivolous—and therefore that the client's interests would not be served by proceeding with the appeal—the advocate does not violate his or her duty to the client by supporting a motion to withdraw with a brief that complies with both *Anders* and the Wisconsin Rule.

The judgment of the Wisconsin Supreme Court is

Affirmed.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

Indigent and incarcerated, appellant Ellis T. McCoy fights an uphill battle to overturn his conviction. Standing alone, he is hardly a match against the formidable resources the State has committed to keeping him behind bars. Appellant's most crucial ally in this fight is the court-appointed appellate counsel that the State is constitutionally obligated to furnish him. Because the very State that is resolved to deprive appellant of liberty pays his defense counsel, he might understandably suspect his defender's allegiance. Sensitive to that natural distrust, we have always assured indigent defendants such as appellant that our Constitution's guarantee that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense," U. S. Const., Amdt. 6, "contemplates the services of an attorney devoted solely to the interests of his client." *Von Moltke* v. *Gillies*, 332 U. S. 708, 725 (1948) (plurality opinion) (citation omitted). We have counseled them not to fear that they will receive no more justice than they can afford, because the "constitutional requirement of substantial equality and fair process" means that the rich and poor alike deserve "the same rights and opportunities on appeal . . . ." *Anders* v. *California*, 386 U. S. 738, 744, 745 (1967). The Court today reneges on these longstanding assurances by permitting a State to force its appointed defender of the indigent to advocate against his client upon unilaterally concluding that the client's appeal lacks merit. I dissent.

I

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U. S. 853, 862 (1975). See also *Kimmelman* v. *Morrison*, 477 U. S. 365, 379–380 (1986). Accordingly, our Constitution imposes on defense counsel an "overarching duty," *Strickland* v. *Washington*, 466 U. S. 668, 688 (1984), to "advanc[e] 'the undivided interests of his client,'" *Polk County* v. *Dodson*, 454 U. S. 312, 318–319 (1981) (quoting *Ferri* v. *Ackerman*, 444 U. S. 193, 204 (1979)), and on the State a concomitant "constitutional obligation . . . to respect the professional independence of the public defenders whom it engages," 454 U. S., at 321–322 (footnote omitted). Once "the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *United States* v. *Cronic*, 466 U. S. 648, 656–657 (1984) (footnote omitted). Our commitment to the adversarial process, we have repeatedly recognized, is every bit as crucial on appeal of a criminal conviction as it is at trial. See, *e. g.*, *Douglas* v. *California*, 372 U. S. 353 (1963); *Entsminger* v. *Iowa*, 386 U. S. 748, 751 (1967); *Evitts* v. *Lucey*, 469 U. S. 387 (1985). On appeal, as at trial, our Constitution guarantees the accused "an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." *Evitts*, *supra*, at 394 (citations omitted). See also *Jones* v. *Barnes*, 463 U. S. 745, 758 (1983) (BRENNAN, J., dissenting).

Naturally, the defense counsel's duty to advocate, whether on appeal or at trial, is tempered by ethical rules. For example, counsel may not in his or her zeal to advocate a client's case fabricate law or facts or suborn perjury, and must at times disclose law contrary to the client's position. See *ante*, at 440–441, and n. 14. Similarly, defense counsel have an ethical duty not to press appeals they believe to be frivolous, even though other lawyers might see an issue of arguable merit. See *Polk County*, *supra*, at 323–324. For retained counsel, who may decline to represent a paying client in what counsel believes to be a frivolous appeal, the latter duty does not interfere with the duty of unwavering allegiance to the client. Since, however, court-appointed counsel may withdraw only with court approval, the indigent client who insists on pursuing an appeal that counsel finds frivolous presents a unique dilemma: Appointed counsel, cast ostensibly in the role of defender, must announce to the court that will rule on a client's appeal that he or she believes the client has no case.

We have struck a delicate balance permitting an appointed counsel to satisfy his or her ethical duty to the court in the manner that least compromises the constitutional duty to advocate the client's case and that thereby minimizes the disadvantage to the indigent. Our cases make abundantly clear that an appointed counsel's constitutional duty to advocate zealously on the client's behalf does not end abruptly upon his or her conclusion that the client has no case. We have, for example, flatly disapproved of a regime that permits appointed defense counsel—or anyone other than the appellate tribunal itself—to adjudge finally the worthiness of an indigent defendant's appeal. See *Lane* v. *Brown,* 372 U. S. 477, 485 (1963); *Anders* v. *California, supra,* at 744 ("[T]he court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous").

Similarly, our Constitution strictly limits the appointed counsel's latitude to depart from the role of defender—either by declining to advocate at all or, worse yet, by opposing the client—when that counsel believes his or her client's appeal lacks merit. In *Anders, supra,* we held that a court may not permit appointed counsel to withdraw from a criminal appeal on the basis of the bald assertion that "'there is no merit to the appeal.'" *Id.,* at 742. Instead, appointed counsel's "role as advocate requires that he support his client's appeal to the best of his ability" and that any request to withdraw on the ground that the appeal is frivolous "must . . . be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Id.,* at 744. Central to our analysis was the constitutional imperative to "assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel." *Id.,* at 745. This "constitutional requirement of substantial equality and fair process," we held, "can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae.*" *Id.*, at 744. We took pains to emphasize that the *Anders*-brief requirement "would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain." *Id.*, at 745.

Anders' injunction against casting appointed counsel in the role of an *amicus* who might "brief his case against his client" is best understood in light of *Ellis* v. *United States*, 356 U. S. 674 (1958) *(per curiam)*, on which *Anders* relied, where we concluded that defense counsel abdicated their role as advocates by arguing to the court that their client's appeal was meritless. After identifying a single "'possible' area of error," *Ellis* v. *United States*, 101 U. S. App. D. C. 386, 387, 249 F. 2d 478, 479 (1957) (en banc), as presumably *Anders* would require counsel to do, the "defense" memorandum proceeded to prove (not merely to announce) that "there was not such merit even in this aspect of the appeal as to warrant further prosecution of the appeal," and that therefore "no substantial question existed in this case." *Ibid.* (emphasis omitted). The Court of Appeals commended the defense counsel's conduct as faithful to their duty "to advise *the court* in this matter." *Id.*, at 386, 249 F. 2d, at 478 (emphasis in original). See also *ibid.* ("[C]ounsel should determine for the benefit of this court whether the case warranted review"); *id.*, at 387, 249 F. 2d, at 479 ("[C]ounsel appointed by the court to represent indigent defendants who wish to appeal their convictions owe an obligation to the court as well as to their clients"). We summarily vacated the judgment and remanded, roundly criticizing the role that the Court of Appeals encouraged counsel to play: "In this case, it appears that the two attorneys appointed by the Court of Appeals, performed essentially the role of *amici curiae.* But *repre-*

sentation in the role of an advocate is required." 356 U. S., at 675 (emphasis added).[1]

Anders and *Ellis* together carefully prescribe the contours of appointed counsel's constitutional duty upon concluding that an appeal lacks merit. Appointed counsel must advocate anything in the record arguably supporting the client's position. When counsel has nothing further to say in the client's defense, he or she should say no more. At that point, an unadorned statement that counsel believes the appeal to be frivolous satisfies the appointed counsel's constitutional duty to the client and ethical duty to the court, see *Polk County*, 454 U. S., at 323, and any further discussion of the merits impermissibly casts defense counsel in the role of *amicus*.

II

Wisconsin's Rule 809.32(1) forces appointed counsel to do exactly what we denounced in *Ellis* and *Anders*. The Rule begins with the requirement, consistent with *Anders*, that appointed counsel "shall file with the court of appeals . . . a brief in which is stated anything in the record that might arguably support the appeal," but in the next breath it departs from *Anders'* prescription by requiring also "a discussion of why the issue lacks merit." Wis. Rule App. Proc. 809.32(1). The Wisconsin Supreme Court, in language reminiscent of the Court of Appeals' opinion in *Ellis*, extolled the discussion requirement "as a significant administrative aid to the reviewing court [which] serves an informational function and, equally important, enables the court to operate in a more efficient, expeditious and cost-saving manner." *Wisconsin ex*

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[1] Viewed in that light, our statement in *Anders* that we "would not force appointed counsel to brief his case against his client," *Anders* v. *California*, 386 U. S. 738, 745 (1967), or to act as an *amicus curiae*, is directly responsive to Anders' argument that, notwithstanding *Ellis*, "[c]ounsel must convince the court that the issues are truly 'frivolous.' This must be done in a documented memorandum which analyzes the facts and applicable law." Brief for Petitioner in *Anders* v. *California*, O. T. 1966, No. 98, p. 16.

rel. McCoy v. *Wisconsin Court of Appeals*, 137 Wis. 2d 90, 103, 403 N. W. 2d 449, 455 (1987). As in *Ellis*, the foregoing functions, however expedient they might be, describe a role ordinarily filled not by defense counsel, but by *amici* and the State's attorney. Under the Rule, then, a court-appointed counsel no longer "acts in the role of an active advocate in behalf of his client." *Anders*, 386 U. S., at 744. Far from providing the accused "Assistance of Counsel for his defense," as the Sixth Amendment mandates, the Rule explicitly "force[s] appointed counsel to brief his case against his client," *id.*, at 745. No less than the no-merit briefs we disapproved in *Ellis*, the no-merit discussion undermines the "very premise of our adversary system of criminal justice," *Herring*, 422 U. S., at 862.

The Court's curious conclusion that counsel nevertheless does not act as an *amicus curiae* when he or she files the requisite no-merit discussion is rooted in a single observation: that the requirement poses little danger that counsel, in deciding whether "to pursue the appeal," will improperly "weig[h] the probability of success against the time burdens on the court and the attorney." *Ante*, at 443 (citation omitted). But declining to burden the court with another case or another brief is not the only, nor even the most common, sense in which counsel act as *amici*, and is assuredly not the meaning that *Anders* and *Ellis* ascribed to the term. The most common definition of "*amicus curiae*" is "[a] person with a strong interest in or views on the subject matter of an action [who] petition[s] the court for permission to file a brief . . . to suggest a rationale consistent with its own views." Black's Law Dictionary 75 (5th ed., 1979). And as the numerous passages quoted above from *Ellis* and *Anders* make clear, the Court's reference to *amici* focused more on the concern that counsel might advocate against their client than on the concern that they might not advocate at all (a possibility that *Anders* itself prohibits). Thus, the Wisconsin Rule falls squarely within our flat prohibition against casting defense counsel in the role of *amici.*

Not only does Wisconsin's Rule impinge upon the right to counsel, but—contrary to our admonition that "there can be no equal justice where the kind of appeal a man enjoys 'depends on the amount of money he has,'" *Douglas*, 372 U. S., at 355 (quoting *Griffin* v. *Illinois*, 351 U. S. 12, 19 (1956) (plurality opinion))—it does so in manner that ensures the poor will not have "the same rights and opportunities on appeal" as the rich. *Anders, supra*, at 745. Central to the Court's contrary position is its repeated observation that neither rich nor poor are entitled to pursue a frivolous appeal. See *ante*, at 436, 438–439. At issue here, however, is not the indigent's right "'to pester a court with frivolous arguments . . . that cannot conceivably persuade the court,'" *ante*, at 436 (citation omitted), nor the right to a state-funded "unscrupulous attorney" to do so, *ante*, at 439, n. 12, but the indigent's right to the usual adversary appellate process to test the validity of a conviction even though a single attorney unilaterally concludes that the appeal lacks merit. Legal issues do not come prepackaged with the labels "frivolous" or "arguably meritorious." If such characterizations were typically unanimous or uncontroversial, we could freely permit defense counsel to decide finally whether an appeal should proceed, but see *Lane* v. *Brown*, 372 U. S. 477 (1963), or to advise the court without any advocacy on their clients' behalf that an appeal is frivolous, but see *Anders, supra; Ellis, supra.* It by no means impugns the legal profession's integrity to acknowledge that reasonable attorneys can differ as to whether a particular issue is arguably meritorious.

Therein lies the Wisconsin Rule's inequity. When retained counsel in Wisconsin declines to appeal a case on the ground that he or she believes the appeal to be frivolous, the wealthy client can always seek a second opinion and might well find a lawyer who in good conscience believes it to have arguable merit. In no event, however, will any lawyer file in the wealthy client's name a brief that undercuts his or her position. In contrast, when appointed counsel harbors the same belief, the indigent client has no recourse to a second opinion, and (unless he or she withdraws the appeal) must respond in court to the arguments of his or her own defender. An indigent defendant who accepts the State's offer of counsel must submit to the state-imposed risk that counsel will advocate against him or her upon unilaterally concluding that the appeal is frivolous, but the defendant with means to purchase a defender whose allegiance is undivided need never fear such treachery. When retained counsel "actively represent conflicting interests" we deride them as "ineffective," *Cuyler* v. *Sullivan*, 446 U. S. 335, 350 (1980); see *Wheat* v. *United States*, *ante*, p. 153, but when appointed counsel actively brief both sides of an appeal we congratulate them for achieving "substantial equality and fair procedure," *ante*, at 435.

The Court is left, then, to justify the inequality on the basis of an imagined distinction between the "typical advocate's brief in a criminal appeal" and the *Anders* brief. *Ante*, at 442.[2] It is true that the question presented to the court in an *Anders* brief (whether the appeal has arguable merit) differs from that presented in a brief on the merits (whether the accused should prevail). Any substantive difference between the two questions, however, does not in itself suggest, as the Court maintains, that counsel's advocacy on behalf of a client should be any less forceful in the one context than in the other. *Anders* itself makes clear that the role of counsel writing an *Anders* brief, like his or her role in a "typical advocate's brief," is to advocate. The no-merit letter filed by Anders' lawyer was flawed because it "did not furnish [Anders] with counsel acting *in the role of an advocate* nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity," *Anders*, 386 U. S., at 743 (emphasis added). The *Anders* brief is supposed to aid the reviewing court, but not in the sense that an *amicus* does. Rather the *Anders* brief was designed to spare the reviewing court from having to sift through "only the cold record . . . *without the help of an advocate*," *id.*, at 745 (emphasis added).

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[2] As a preliminary matter, the Court's contention that the brief prescribed by Wisconsin law "is not a substitute for an advocate's brief on the merits," *ante*, at 444; see also *ante*, at 439–440, n. 13, is belied by the reality that such briefs usually culminate not simply in a grant of counsel's motion to withdraw, but in an affirmance of the conviction, see Wis. Rule App. Proc. 809.32(3).

To be sure, the *Anders* brief, unlike the typical brief on the merits, concludes with an assertion—"This appeal is frivolous"—that is contrary to the client's interest. It does not, however, follow that "no constitutional deprivation occurs when the attorney explains the basis for that conclusion." *Ante*, at 443. Such a conclusion, the Court seems to agree, is no different in type from other statements that defense attorneys are obligated to make against their clients' best interests, such as an admission that the weight of authority is against the client's position or that certain facts belie the client's case. See *ante*, at 440–441, and n. 14. No one would suppose that the limited obligation to cite contrary law and facts translates into a general obligation to expose all the weaknesses in a client's case, or even to explain why the particular law or facts cited disfavor the defense. Merely because counsel constitutionally may take slight deviations from the role of advancing the client's undivided interests does not mean that counsel constitutionally may entirely abandon that role, nor even that counsel may depart from that role any more than is absolutely necessary to satisfy the ethical obligation.[3]

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[3] The Court creatively recharacterizes the *Anders* brief as designed to "provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their clients' appeals to the best of their ability," *ante*, at 439. In the first place, *Anders* did not focus on whether the lawyer is a careful defender or a clear thinker. The appellate court may not merely examine counsel's brief and rubber-

Neither the Court nor the State identifies any interest that demands so drastic a departure from defense counsel's "overarching duty," *Strickland*, 466 U. S., at 688, to advocate "the undivided interests of his client," *Ferri* v. *Ackerman*, 444 U. S., at 204. No doubt, a counsel's refutation of the argument that he or she deems frivolous lightens the court's load, and in some circumstances might even expose an analytical flaw that is not apparent from counsel's bare conclusion. But an issue that is so clearly without merit as to be frivolous should reveal itself to the court as such with minimal research and no guidance. One might perhaps hypothesize an issue whose frivolity is so elusive as to require refutation. In such an event, as in every other stage of a criminal prosecution, the Wisconsin Supreme Court was surely correct that "[t]he court will be better equipped to make the correct decision about the potential merits of the appeal if it has before it not only the authorities which might favor an appeal, but also the authorities which might militate against it." 137 Wis. 2d, at 100–101, 403 N. W. 2d, at 454. Never before, however, have we permitted a court to further the interest in having "powerful statements on both sides of [a] question" by compelling a single advocate to take both sides. *Cronic*, 466 U. S., at 655 (footnotes and internal quotations omitted). There is no more reason to command defense counsel to refute defense arguments they deem frivolous than there is to force them to refute their own arguments on the merits of nonfrivolous appeals. In either situation, the State has a corps of lawyers ready and able to perform that task.

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stamp his or her conclusion; it merely uses the brief as a guide in order to conduct an independent inquiry into the otherwise "cold record." *Anders*, 386 U. S., at 745. More importantly, the recharacterization proves little. One might just as easily recharacterize the inquiry on the merits of an appeal as whether counsel correctly concluded that the client should prevail. Yet this recharacterization would not impose on defense counsel an obligation to rebut their own arguments on the merits.

III

The Court purports to leave unscathed the constitutional axiom that appellate counsel "must play the role of an active advocate, rather than a mere friend of the court," *Evitts*, 469 U. S., at 394. Our disagreement boils down to whether defense counsel who details for a court why he or she believes a client's appeal is frivolous befriends the client or the court. The Court looks at Wisconsin's regime and sees a friend of the client who "assur[es] that the constitutional rights of indigent defendants are scrupulously honored." *Ante*, at 444. I look at the same regime and see a friend of the court whose advocacy is so damning that the prosecutor never responds. See Tr. of Oral Arg. 13–14, 30. Either way, with friends like that, the indigent criminal appellant is truly alone.

CLARK *v.* JETER

CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

No. 87–5565. Argued April 19, 1988—Decided June 6, 1988

Ten years after her illegitimate daughter's birth, petitioner filed a support complaint on the daughter's behalf in a Pennsylvania state court, naming respondent as the father. Although a blood test showed a 99.3% probability that respondent was the father, the court entered judgment for respondent on the basis of a state statute providing that actions to establish the paternity of an illegitimate child ordinarily must be commenced within six years of the child's birth. The court rejected petitioner's contentions that the statute violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Federal Constitution. While petitioner's appeal to the Superior Court of Pennsylvania was pending, the State adopted an 18-year statute of limitations for paternity actions, in order to comply with a requirement of the federal Child Support Enforcement Amendments of 1984 (federal Act). The Superior Court concluded, however, that the new 18-year statute of limitations did not apply retroactively, and that the 6-year period would continue to apply in cases like petitioner's. The court affirmed the trial court's conclusion that the 6-year statute of limitations was constitutional.

Held:

1. Petitioner's contention that the 6-year statute of limitations is invalid because it conflicts with an asserted retroactivity requirement in the federal Act will not be addressed by this Court, since the question of federal pre-emption was not adequately presented to the Superior Court by petitioner's state-law retroactivity argument, and was not decided by that court. Pp. 459–460.

2. The 6-year statute of limitations violates the Equal Protection Clause. Under the heightened scrutiny analysis used in evaluating equal protection challenges to statutes of limitations that apply to illegitimate children's paternity suits, the period for obtaining support must be sufficiently long to present a reasonable opportunity for those with an interest in illegitimate children to assert claims on their behalf, and any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims. *Mills* v. *Habluetzel*, 456 U. S. 91; *Pickett* v. *Brown*, 462 U. S. 1. Under this analysis, it is questionable whether Pennsylvania's 6-year period is reasonable, since a mother may for years after her child's birth be unwilling to assert a claim due to her relationship with the natural father, the emotional strain of having an illegitimate child, or the

desire to avoid community and family disapproval; since such a mother might realize only belatedly a loss of income attributable to the need to care for the child; and since financial difficulties are likely to increase as the child matures and incurs additional expenses. Moreover, that the 6-year period is not substantially related to an interest in avoiding the litigation of stale or fraudulent claims is established by a number of Pennsylvania statutes, including the 18-year statute of limitations, that permit paternity to be litigated more than six years after an illegitimate child's birth; and by the fact that increasingly sophisticated scientific tests facilitate the establishing of paternity regardless of the child's age. Pp. 460–465.

358 Pa. Super. 550, 518 A. 2d 276, reversed and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Evalynn B. Welling argued the cause for petitioner. With her on the brief was *Eileen D. Yacknin.*

Craig McClean argued the cause for respondent. With him on the brief was *Wendell G. Freeland.**

JUSTICE O'CONNOR delivered the opinion of the Court.

Under Pennsylvania law, an illegitimate child must prove paternity before seeking support from his or her father, and a suit to establish paternity ordinarily must be brought within six years of an illegitimate child's birth. By contrast, a legitimate child may seek support from his or her parents at any time. We granted certiorari to consider the constitutionality of this legislative scheme.

I

On September 22, 1983, petitioner Cherlyn Clark filed a support complaint in the Allegheny County Court of Common Pleas on behalf of her minor daughter, Tiffany, who was born out of wedlock on June 11, 1973. Clark named respondent

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union Foundation et al. by *John A. Powell, Helen Hershkoff, Steven R. Shapiro,* and *Stefan Presser;* and for the Women's Legal Defense Fund et al. by *Erwin N. Griswold, Judith L. Lichtman, Donna R. Lenhoff,* and *James D. Weill.*

Gene Jeter as Tiffany's father. The court ordered blood tests, which showed a 99.3% probability that Jeter is Tiffany's father.

Jeter moved to dismiss the complaint on the ground that it was barred by the 6-year statute of limitations for paternity actions.* In her response, Clark contended that this statute is unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In the alternative, she argued that the statute was tolled by fraudulent and misleading actions of the welfare department, or by threats and assaults by Jeter.

The trial court upheld the statute of limitations on the authority of *Astemborski* v. *Susmarski*, 499 Pa. 99, 451 A. 2d 1012 (1982), vacated, 462 U. S. 1127 (1983), reinstated on remand, 502 Pa. 409, 466 A. 2d 1018 (1983). The Pennsylvania Supreme Court there had considered and rejected constitutional challenges similar to Clark's. The trial court also rejected Clark's argument that the statute should be tolled, specifically finding that any fear that Clark may have had of Jeter had subsided more than six years before she filed her support complaint. Therefore, the trial court entered judgment for Jeter.

Clark appealed to the Superior Court of Pennsylvania, again raising her constitutional challenges to the 6-year statute of limitations. Before the court decided her case, the

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*Although Jeter's motion referred to § 6704(e), that section had been altered slightly and relabeled as § 6704(b) at the time of the litigation below. See Act of Dec. 20, 1982, No. 326, Art. II, § 201, 1982 Pa. Laws 1409. As amended, the section provided:

"All actions or proceedings to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action or proceeding may be commenced at any time within two years of any such contribution or acknowledgement by the reputed father." 42 Pa. Cons. Stat. § 6704(b) (1982) (repealed 1985).

Pennsylvania Legislature enacted an 18-year statute of limitations for actions to establish paternity. Act of Oct. 30, 1985, No. 66, § 1, subch. C, 1985 Pa. Laws 270, codified at 23 Pa. Cons. Stat. § 4343(b) (1985). Pennsylvania thereby brought its law into compliance with a provision of the federal Child Support Enforcement Amendments of 1984 that requires all States participating in the federal child support program to have procedures to establish the paternity of any child who is less than 18 years old. 98 Stat. 1307, 42 U. S. C. § 666(a)(5) (1982 ed., Supp. IV). The Superior Court concluded, however, that Pennsylvania's new 18-year statute of limitations did not apply retroactively, and that it would not revive Clark's cause of action in any event. 358 Pa. Super. 550, 518 A. 2d 276 (1986). It affirmed the trial court's conclusions that the 6-year statute of limitations was constitutional, and that Clark's tolling argument was without merit. Thereafter, the Superior Court denied Clark's motion for reargument. The Pennsylvania Supreme Court denied her petition for allowance of appeal. We granted Clark's petition for certiorari. 484 U. S. 1003 (1988).

II

Clark's first argument to this Court is that Pennsylvania's 6-year statute of limitations is invalid because it conflicts with the federal Child Support Enforcement Amendments of 1984, which she says require States to adopt retroactive 18-year statutes of limitations in paternity cases. See 42 U. S. C. § 666(a)(5) (1982 ed., Supp. IV). Because this argument raises an issue of statutory interpretation, we ordinarily would address it before reaching the constitutional claims. *Blum* v. *Bacon*, 457 U. S. 132, 137 (1982); see *Townsend* v. *Swank*, 404 U. S. 282, 285, 291 (1971). Having reviewed the record, however, we find that Clark did not adequately present a federal pre-emption argument to the lower courts. It is our practice, when reviewing decisions by state courts, not to decide federal claims that were not "pressed or passed upon" below. *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U. S. 71, 79–80 (1988).

The Pennsylvania Legislature passed the 18-year statute of limitations on October 30, 1985. At that time, Clark already had filed her brief on appeal to the Superior Court. Clark immediately suggested a remand to determine the retroactivity of the new Pennsylvania statute. But the Superior Court instead itself decided that the 6-year statute of limitations would continue to apply to cases like Clark's. The court reasoned that, under Pennsylvania law, a statute is retroactive only if the legislature clearly and manifestly so intends, and it found insufficient evidence of such an intent. The decision did not address the relevance of the federal Child Support Enforcement Amendments to the continuing validity of the 6-year statute of limitations. 358 Pa. Super., at 553–555, 518 A. 2d, at 278.

In her application for reargument in the Superior Court and in her petition for appeal to the Pennsylvania Supreme Court, Clark argued that the Superior Court had overlooked Pennsylvania cases which had applied similar statutes of limitations retroactively, as well as indications that the federal Child Support Enforcement Amendments required States to adopt retroactive 18-year statutes of limitations or their equivalent. See 42 U. S. C. § 666(a)(5) (1982 ed., Supp. III); 50 Fed. Reg. 19608, 19631 (1985). But Clark did not expressly assert that the 6-year statute of limitations was pre-empted by the new federal law. We interpret Clark's argument to be that the Pennsylvania Legislature intended to comply with the new conditions on the federal spending program, which arguably showed that it clearly and manifestly intended its new statute to be retroactive. This question of how to interpret the Pennsylvania statute ultimately is a matter of state law. We find that Clark's argument below was not adequate to raise a federal pre-emption claim. Accordingly, we do not address it here and proceed to her equal protection claim.

In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U. S. Const., Amdt. 14, § 1, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 17 (1973); cf. *Lyng* v. *Automobile Workers*, 485 U. S. 360, 370 (1988). Classifications based on race or national origin, *e. g.*, *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967), and classifications affecting fundamental rights, *e. g.*, *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 672 (1966), are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy. See, *e. g.*, *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 723–724, and n. 9 (1982); *Mills* v. *Habluetzel*, 456 U. S. 91, 99 (1982); *Craig* v. *Boren*, 429 U. S. 190, 197 (1976); *Mathews* v. *Lucas*, 427 U. S. 495, 505–506 (1976).

To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective. Consequently we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because "visiting this condemnation on the head of an infant is illogical and unjust." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 175 (1972). Yet, in the seminal case concerning the child's right to support, this Court acknowledged that it might be appropriate to treat illegitimate children differently in the support context because of "lurking problems with respect to proof of paternity." *Gomez* v. *Perez*, 409 U. S. 535, 538 (1973).

This Court has developed a particular framework for evaluating equal protection challenges to statutes of limitations that apply to suits to establish paternity, and thereby limit the ability of illegitimate children to obtain support.

> "First, the period for obtaining support . . . must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims." *Mills* v. *Habluetzel*, 456 U. S., at 99–100.

In *Mills*, we held that Texas' 1-year statute of limitations failed both steps of the analysis. We explained that paternity suits typically will be brought by the child's mother, who might not act swiftly amidst the emotional and financial complications of the child's first year. And, it is unlikely that the lapse of a mere 12 months will result in the loss of evidence or appreciably increase the likelihood of fraudulent claims. *Id.*, at 100–101. A concurring opinion in *Mills* explained why statutes of limitations longer than one year also may be unconstitutional. *Id.*, at 102–106 (O'CONNOR, J., joined by Burger, C. J., and BRENNAN and BLACKMUN, JJ., and joined as to Part I by Powell, J., concurring). First, the State has a countervailing interest in ensuring that genuine claims for child support are satisfied. Second, the fact that Texas tolled most other causes of action during a child's minority suggested that proof problems do not become overwhelming during this period. Finally, the practical obstacles to filing a claim for support are likely to continue after the first year of the child's life.

In *Pickett* v. *Brown*, 462 U. S. 1 (1983), the Court unanimously struck down Tennessee's 2-year statute of limitations for paternity and child support actions brought on behalf of certain illegitimate children. Adhering to the analysis developed in *Mills*, the Court first considered whether two years afforded a reasonable opportunity to bring such suits. The Tennessee statute was relatively more generous than the

Texas statute considered in *Mills* because it did not limit actions against a father who had acknowledged his paternity in writing or by furnishing support; nor did it apply if the child was likely to become a public charge. Nevertheless, the Court concluded that the 2-year period was too short in light of the persisting financial and emotional problems that are likely to afflict the child's mother. Proceeding to the second step of the analysis, the Court decided that the 2-year statute of limitations was not substantially related to Tennessee's asserted interest in preventing stale and fraudulent claims. The period during which suit could be brought was only a year longer than the period considered in *Mills*, and this incremental difference would not create substantially greater proof and fraud problems. Furthermore, Tennessee tolled most other actions during a child's minority, and even permitted a support action to be brought on behalf of a child up to 18 years of age if the child was or was likely to become a public charge. Finally, scientific advances in blood testing had alleviated some problems of proof in paternity actions. For these reasons, the Tennessee statute failed to survive heightened scrutiny under the Equal Protection Clause.

In light of this authority, we conclude that Pennsylvania's 6-year statute of limitations violates the Equal Protection Clause. Even six years does not necessarily provide a reasonable opportunity to assert a claim on behalf of an illegitimate child. "The unwillingness of the mother to file a paternity action on behalf of her child, which could stem from her relationship with the natural father or . . . from the emotional strain of having an illegitimate child, or even from the desire to avoid community and family disapproval, may continue years after the child is born. The problem may be exacerbated if, as often happens, the mother herself is a minor." *Mills*, *supra*, at 105, n. 4 (O'CONNOR, J., concurring). Not all of these difficulties are likely to abate in six years. A mother might realize only belatedly "a loss of income attributable to the need to care for the child," *Pickett*, *supra*, at 12. Furthermore, financial difficulties are likely to increase as the child matures and incurs expenses for clothing, school, and medical care. See, *e. g.*, *Moore* v. *McNamara*, 40 Conn. Supp. 6, 11, 12, 478 A. 2d 634, 637 (1984) (invalidating a 3-year statute of limitations). Thus it is questionable whether a State acts reasonably when it requires most paternity and support actions to be brought within six years of an illegitimate child's birth.

We do not rest our decision on this ground, however, for it is not entirely evident that six years would necessarily be an unreasonable limitations period for child support actions involving illegitimate children. We are, however, confident that the 6-year statute of limitations is not substantially related to Pennsylvania's interest in avoiding the litigation of stale or fraudulent claims. In a number of circumstances, Pennsylvania permits the issue of paternity to be litigated more than six years after the birth of an illegitimate child. The statute itself permits a suit to be brought more than six years after the child's birth if it is brought within two years of a support payment made by the father. And in other types of suits, Pennsylvania places no limits on when the issue of paternity may be litigated. For example, the intestacy statute, 20 Pa. Cons. Stat. § 2107(3) (1982), permits a child born out of wedlock to establish paternity as long as "there is clear and convincing evidence that the man was the father of the child." Likewise, no statute of limitations applies to a father's action to establish paternity. *In re Mengel*, 287 Pa. Super. 186, 429 A. 2d 1162 (1981). Recently, the Pennsylvania Legislature enacted a statute that tolls most other civil actions during a child's minority. 42 Pa. Cons. Stat. § 5533(b) (Supp. 1987). In *Pickett* and *Mills*, similar tolling statutes cast doubt on the State's purported interest in avoiding the litigation of stale or fraudulent claims. 462 U. S., at 15–16; 456 U. S., at 104–105 (O'CONNOR, J., concurring); *id.*, at 106 (Powell, J., concurring in judgment). Pennsylvania's tolling statute has the same implications here.

A more recent indication that Pennsylvania does not consider proof problems insurmountable is the enactment by the Pennsylvania Legislature in 1985 of an 18-year statute of limitations for paternity and support actions. 23 Pa. Cons. Stat. § 4343(b) (1985). To be sure the legislature did not act spontaneously, but rather under the threat of losing some federal funds. Nevertheless, the new statute is a tacit concession that proof problems are not overwhelming. The legislative history of the federal Child Support Enforcement Amendments explains why Congress thought such statutes of limitations are reasonable. Congress adverted to the problem of stale and fraudulent claims, but recognized that increasingly sophisticated tests for genetic markers permit the exclusion of over 99% of those who might be accused of paternity, regardless of the age of the child. H. R. Rep. No. 98–527, p. 38 (1983). This scientific evidence is available throughout the child's minority, and it is an additional reason to doubt that Pennsylvania had a substantial reason for limiting the time within which paternity and support actions could be brought.

We conclude that the Pennsylvania statute does not withstand heightened scrutiny under the Equal Protection Clause. We therefore find it unnecessary to reach Clark's due process claim. The judgment of the Superior Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SHAPERO *v.* KENTUCKY BAR ASSOCIATION

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 87–16. Argued March 1, 1988—Decided June 13, 1988

Petitioner, a member of the Kentucky Bar, applied to that State's Attorneys Advertising Commission for approval of a letter that he proposed to send "to potential clients who have had a foreclosure suit filed against them," which, *inter alia,* advised the client that "you may be about to lose your home," that "[f]ederal law may allow you to . . . *ORDE[R]* your creditor to *STOP,*" that "you may call my office . . . for *FREE* information," and that "[i]t may surprise you what I may be able to do for you." Although the Commission did not find the letter false or misleading, it declined to approve it on the ground that a then-existing Kentucky Supreme Court Rule prohibited the mailing or delivery of written advertisements "precipitated by a specific event . . . involving or relating to the addressee . . . as distinct from the general public." Nevertheless, the Commission registered its view that the Rule violated the First Amendment under *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, and recommended its amendment by the State Supreme Court. Petitioner then sought an advisory opinion as to the Rule's validity from the State Bar Association's Ethics Committee, which upheld the Rule as consistent with Rule 7.3 of the American Bar Association's Model Rules of Professional Conduct. On review of the advisory opinion, the State Supreme Court held that *Zauderer* compelled the State Rule's deletion, and replaced it with Rule 7.3, which also prohibits targeted, direct-mail solicitation by lawyers for pecuniary gain, without a particularized finding that the solicitation is false or misleading. The court did not specify either the precise infirmity in the State Rule, or how Rule 7.3 cured it.

Held: The judgment is reversed, and the case is remanded.

726 S. W. 2d 299, reversed and remanded.

JUSTICE BRENNAN delivered the opinion of the Court as to Parts I and II, concluding that a State may not, consistent with the First and Fourteenth Amendments, categorically prohibit lawyers from soliciting business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems. Such advertising is constitutionally protected commercial speech, which may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest. *Zauderer, supra.* Moreover, this Court's lawyer advertising cases have never distinguished among various modes of written advertising to the general public, as is recognized by Rule 7.3's exemption for advertising "distributed generally to persons not known to need [the particular] legal services . . . , but who are so situated that they might in general find such services useful." The court below disapproved petitioner's letter solely on the basis of its failure to qualify for this exemption, analogizing to *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, for the proposition that targeted, direct-mail solicitation by a trained lawyer to a potential client "overwhelmed" by his legal troubles and therefore having an "impaired capacity for good judgment" creates a serious potential for undue influence. However, respondent's reliance on *Ohralik*, which held that a State could categorically ban all in-person solicitation, is misplaced, since the two factors underlying that decision—the strong possibility of improper lawyer conduct and the improbability of effective regulation—are much less a risk in the targeted, direct-mail solicitation context. The recipient of such advertising is not faced with the coercive presence of a trained advocate or the pressure for an immediate yes-or-no answer to the representation offer, but can simply put the letter aside to be considered later, ignored, or discarded. Moreover, although a personalized letter does present increased risks of isolated abuses or mistakes, these can be regulated and minimized by requiring the lawyer to file the letter with a state agency having authority to supervise mailings and penalize actual abuses. Scrutiny of targeted solicitation letters will not be appreciably less reliable than scrutiny of other advertisements, since the reviewing agency can require the lawyer to prove or verify any fact stated or explain how it was discovered, or require that the letter be labeled as an advertisement or that it tell the reader how to report inaccurate or misleading matters. That an agency reviewing such letters might have more work than one that does not simply does not outweigh the importance of the free flow of commercial information. Pp. 472–478.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE KENNEDY, concluded in Part III that, although the validity of Rule 7.3 does not turn on whether petitioner's letter itself exhibited any of the evils at which the Rule was directed, respondent's contention that the letter is particularly overreaching, and therefore unworthy of First Amendment protection, must be addressed since the Amendment's overbreadth doctrine does not apply to professional advertising. However, although the letter's liberal use of underscored, uppercase letters and its inclusion of subjective predictions of client satisfaction might catch the recipient's attention more than would a bland statement of purely objective facts in small type, the letter presents no risk of overreaching comparable to that of a lawyer engaged in face-to-face solicitation. In light of the First Amendment's protection, a State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient. Moreover, the State may not absolutely ban certain types of potentially misleading information if the information may also be presented in a nondeceptive way, or impose a more particularized restriction, unless it asserts, as respondent has not done in this case, a valid substantial interest that such a restriction would directly advance. Although a letter may be so misleading as to warrant restriction if it unduly emphasizes trivial or relatively uninformative facts or offers overblown assurances of client satisfaction, respondent has not argued such defects here. Such arguments may be raised and considered on remand. Pp. 478–480.

BRENNAN, J., announced the judgment of the Court and delivered the opinion of the Court with respects to Parts I and II, in which WHITE, MARSHALL, BLACKMUN, STEVENS, and KENNEDY, JJ., joined, and an opinion with respect to Part III, in which MARSHALL, BLACKMUN, and KENNEDY, JJ., joined. WHITE, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined, *post*, p. 480. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 480.

Donald L. Cox argued the cause for petitioner. With him on the briefs was *Mary Janice Lintner*.

Frank P. Doheny, Jr., argued the cause for respondent. With him on the brief was *Joseph L. Lenihan*.*

JUSTICE BRENNAN announced the judgment of the Court and delivered the opinion of the Court as to Parts I and II and an opinion as to Part III in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE KENNEDY join.

This case presents the issue whether a State may, consistent with the First and Fourteenth Amendments, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems.

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*Briefs of *amici curiae* urging affirmance were filed for the Academy of Florida Trial Lawyers by *C. Rufus Pennington III;* for the American Bar Association by *Robert MacCrate*, *Michael Franck*, and *George Kuhlman;* for the Association of Trial Lawyers of America by *Jeffrey Robert White;* and for the Florida Bar by *Barry Richard* and *Ray Ferrero, Jr.*

I

In 1985, petitioner, a member of Kentucky's integrated Bar Association, see Ky. Sup. Ct. Rule 3.030 (1988), applied to the Kentucky Attorneys Advertising Commission[1] for approval of a letter that he proposed to send "to potential clients who have had a foreclosure suit filed against them." The proposed letter read as follows:

> "It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by *ORDERING* your creditor *[sic]* to *STOP* and give you more time to pay them.
>
> "You may call my office anytime from 8:30 a. m. to 5:00 p. m. for *FREE* information on how you can keep your home.
>
> "Call *NOW*, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is *FREE*, there is *NO* charge for calling."

The Commission did not find the letter false or misleading. Nevertheless, it declined to approve petitioner's proposal on the ground that a then-existing Kentucky Supreme Court Rule prohibited the mailing or delivery of written advertisements "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public." Ky. Sup. Ct. Rule 3.135(5)(b)(i).[2] The Commission registered its view that Rule 3.135(5)(b)(i)'s ban on targeted, direct-mail advertising violated the First Amendment—specifically the principles enunciated in *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985)—and recommended that the Kentucky Supreme Court amend its Rules. See App. to Pet. for Cert. 11a–15a. Pursuing the Commission's suggestion, petitioner petitioned the Committee on Legal Ethics (Ethics Committee) of the Kentucky Bar Association for an advisory opinion as to the Rule's validity. See Ky. Sup. Ct. Rule 3.530; n. 1, *supra*. Like the Commission, the Ethics Committee, in an opinion formally adopted by the Board of Governors of the Bar Association, did not find the proposed letter false or misleading, but nonetheless upheld Rule 3.135(5)(b)(i) on the ground that it was consistent with Rule 7.3 of the American Bar Association's Model Rules of Professional Conduct (1984). App. to Pet. for Cert. 9a.

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[1] The Attorneys Advertising Commission is charged with the responsibility of "regulating attorney advertising as prescribed" in the Rules of the Kentucky Supreme Court. Ky. Sup. Ct. Rule 3.135(3) (1988). The Commission's decisions are appealable to the Board of Governors of the Kentucky Bar Association, Rule 3.135(8)(a), and are ultimately reviewable by the Kentucky Supreme Court. Rule 3.135(8)(b). "Any attorney who is in doubt as to the propriety of any professional act contemplated by him" also has the option of seeking an advisory opinion from a committee of the Kentucky Bar Association, which, if formally adopted by the Board of Governors, is reviewable by the Kentucky Supreme Court. Rule 3.530.

On review of the Ethics Committee's advisory opinion, the Kentucky Supreme Court felt "compelled by the decision in *Zauderer* to order [Rule 3.135(5)(b)(i)] deleted," 726 S. W. 2d 299, 300 (1987), and replaced it with the ABA's Rule 7.3, which provides in its entirety:

> "'A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term 'solicit' includes contact in person, by telephone or

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[2] Rule 3.135(5)(b)(i) provided in full:

"A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public."

> telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.'" 726 S. W. 2d, at 301 (quoting ABA, Model Rule of Professional Conduct 7.3 (1984)).

The court did not specify either the precise infirmity in Rule 3.135(5)(b)(i) or how Rule 7.3 cured it. Rule 7.3, like its predecessor, prohibits targeted, direct-mail solicitation by lawyers for pecuniary gain, without a particularized finding that the solicitation is false or misleading. We granted certiorari to resolve whether such a blanket prohibition is consistent with the First Amendment, made applicable to the States through the Fourteenth Amendment, 484 U. S. 814 (1987), and now reverse.[3]

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[3] We reject respondent's request that we dismiss or affirm this case because "the Supreme Court of Kentucky granted Shapero precisely the relief which he requested." Brief for Respondent 11. The court below did, as petitioner prayed, "declare . . . rule [3.135(5)(b)(i)] void," Motion for Review of Advisory Opinion E–310, No. 86–SC–335 (Sup. Ct. Ky.). The court's ultimate disposition, however, was to adopt a new Rule with the same defect that petitioner identified in the old one and to "affirm the decision of the Ethics Committee to deny [petitioner's] request" for approval of his letter. 726 S. W. 2d 299, 301 (1987). Petitioner surely cannot be said to have prevailed below.

Nor does the fact that petitioner never leveled his constitutional challenge specifically against Rule 7.3 mean that this case presents "federal constitutional issues [that were] raised here for the first time on review of [a] state court decisio[n]," *Cardinale* v. *Louisiana*, 394 U. S. 437, 438 (1969). The parties briefed and argued the constitutionality of a categorical ban on targeted, direct-mail advertising, and the court below plainly considered and rejected those arguments as it adopted Model Rule 7.3. See 726 S. W. 2d, at 300.

We also decline respondent's invitation to dismiss this case in order to avoid interference with ongoing state judicial proceedings. See *Younger*

II

Lawyer advertising is in the category of constitutionally protected commercial speech. See *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977). The First Amendment principles governing state regulation of lawyer solicitations for pecuniary gain are by now familiar: "Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Zauderer*, *supra*, at 638 (citing *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 566 (1980)). Since state regulation of commercial speech "may extend only as far as the interest it serves," *Central Hudson*, *supra*, at 565, state rules that are designed to prevent the "potential for deception and confusion . . . may be no broader than reasonably necessary to prevent the" perceived evil. *In re R. M. J.*, 455 U. S. 191, 203 (1982).

In *Zauderer*, application of these principles required that we strike an Ohio rule that categorically prohibited solicitation of legal employment for pecuniary gain through advertisements containing information or advice, even if truthful and nondeceptive, regarding a specific legal problem. We distinguished written advertisements containing such information or advice from in-person solicitation by lawyers for profit, which we held in *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978), a State may categorically ban. The "unique features of in-person solicitation by lawyers [that] justified a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain," we observed, are "not present" in the context of written advertisements. *Zauderer*, *supra*, at 641–642.

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v. *Harris*, 401 U. S. 37 (1971). Once the court below rendered its final judgment in this case, there was no longer any pending state judicial proceeding.

Our lawyer advertising cases have never distinguished among various modes of written advertising to the general public. See, *e. g.*, *Bates*, *supra* (newspaper advertising); *id.*, at 372, n. 26 (equating advertising in telephone directory with newspaper advertising); *In re R. M. J.*, *supra* (mailed announcement cards treated same as newspaper and telephone directory advertisements). Thus, Ohio could no more prevent Zauderer from mass-mailing to a general population his offer to represent women injured by the Dalkon Shield than it could prohibit his publication of the advertisement in local newspapers. Similarly, if petitioner's letter is neither false nor deceptive, Kentucky could not constitutionally prohibit him from sending at large an identical letter opening with the query, "Is your home being foreclosed on?," rather than his observation to the targeted individuals that "It has come to my attention that your home is being foreclosed on." The drafters of Rule 7.3 apparently appreciated as much, for the Rule exempts from the ban "letters addressed or advertising circulars distributed generally to persons . . . who are so situated that they might in general find such services useful."

The court below disapproved petitioner's proposed letter solely because it targeted only persons who were "known to need [the] legal services" offered in his letter, 726 S. W. 2d, at 301, rather than the broader group of persons "so situated that they might in general find such services useful." Generally, unless the advertiser is inept, the latter group would include members of the former. The only reason to disseminate an advertisement of particular legal services among those persons who are "so situated that they might in general find such services useful" is to reach individuals who *actually* "need legal services of the kind provided [and advertised] by the lawyer." But the First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable.

The court below did not rely on any such theory. See also Brief for Respondent 37 (conceding that "targeted direct mail *advertising*"—as distinguished from "*solicitation*"—"is constitutionally protected") (emphasis in original). Rather, it concluded that the State's blanket ban on all targeted, direct-mail solicitation was permissible because of the "serious potential for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services." 726 S. W. 2d, at 301. By analogy to *Ohralik*, the court observed:

> "Such solicitation subjects the prospective client to pressure from a trained lawyer in a direct personal way. It is entirely possible that the potential client may feel overwhelmed by the basic situation which caused the need for the specific legal services and may have seriously impaired capacity for good judgment, sound reason and a natural protective self-interest. Such a condition is full of the possibility of undue influence, overreaching and intimidation." 726 S. W. 2d, at 301.

Of course, a particular potential client will feel equally "overwhelmed" by his legal troubles and will have the same "impaired capacity for good judgment" regardless of whether a lawyer mails him an untargeted letter or exposes him to a newspaper advertisement—concededly constitutionally protected activities—or instead mails a targeted letter. The relevant inquiry is not whether there exist potential clients whose "condition" makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility. Cf. *Ohralik*, *supra*, at 470 (MARSHALL, J., concurring in part and concurring in judgment) ("What is objectionable about Ohralik's behavior here is not so much that he solicited business for himself, but rather the circumstances in which he performed that solicitation and the means by which he accomplished it").

Thus, respondent's facile suggestion that this case is merely "*Ohralik* in writing" misses the mark. Brief for Respondent 10. In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference. Our decision in *Ohralik* that a State could categorically ban all in-person solicitation turned on two factors. First was our characterization of face-to-face solicitation as "a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud." *Zauderer*, 471 U. S., at 641. See *Ohralik*, 436 U. S., at 457–458, 464–465. Second, "unique . . . difficulties," *Zauderer*, *supra*, at 641, would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban because such solicitation is "not visible or otherwise open to public scrutiny." *Ohralik*, 436 U. S., at 466. See also *ibid.* ("[I]n-person solicitation would be virtually immune to effective oversight and regulation by the State or by the legal profession") (footnote omitted). Targeted, direct-mail solicitation is distinguishable from the in-person solicitation in each respect.

Like print advertising, petitioner's letter—and targeted, direct-mail solicitation generally—"poses much less risk of overreaching or undue influence" than does in-person solicitation, *Zauderer*, 471 U. S., at 642. Neither mode of written communication involves "the coercive force of the personal presence of a trained advocate" or the "pressure on the potential client for an immediate yes-or-no answer to the offer of representation." *Ibid.* Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the "reader of an advertisement . . . can 'effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes,'" *Ohralik*, *supra*, at 465, n. 25 (quoting *Cohen* v. *California*, 403 U. S. 15, 21 (1971)). A letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded. In short, both types of written solicitation "conve[y] information about legal services [by means] that [are] more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney." *Zauderer*, *supra*, at 642. Nor does a targeted letter invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery.

Admittedly, a letter that is personalized (not merely targeted) to the recipient presents an increased risk of deception, intentional or inadvertent. It could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case or could implicitly suggest that the recipient's legal problem is more dire than it really is. See Brief for ABA as *Amicus Curiae* 9. Similarly, an inaccurately targeted letter could lead the recipient to believe she has a legal problem that she does not actually have or, worse yet, could offer erroneous legal advice. See, *e. g.*, *Leoni* v. *State Bar of California*, 39 Cal. 3d 609, 619–620, 704 P. 2d 183, 189 (1985), summarily dism'd, 475 U. S. 1001 (1986).

But merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech. See *In re R. M. J.*, 455 U. S., at 203. The State can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, *id.*, at 206, giving the State ample opportunity to supervise mailings and penalize actual abuses. The "regulatory difficulties" that are "unique" to in-person lawyer solicitation, *Zauderer*, *supra*, at 641—solicitation that is "not visible or otherwise open to public scrutiny" and for which it is "difficult or impossible to obtain reliable proof of what actually took place," *Ohralik*, *supra*, at 466—do not apply to written solicitations. The court below offered no basis for its "belie[f] [that] submission of a blank form letter to the Advertising Commission [does not] provid[e] a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation." 726 S. W. 2d, at 301. Its concerns were presumably those expressed by the ABA House of Delegates in its comment to Rule 7.3:

> "State lawyer discipline agencies struggle for resources to investigate specific complaints, much less for those necessary to screen lawyers' mail solicitation material. Even if they could examine such materials, agency staff members are unlikely to know anything about the lawyer or about the prospective client's underlying problem. Without such knowledge they cannot determine whether the lawyer's representations are misleading." ABA, Model Rules of Professional Conduct, pp. 93–94 (1984).

The record before us furnishes no evidence that scrutiny of targeted solicitation letters will be appreciably more burdensome or less reliable than scrutiny of advertisements. See *Bates*, 433 U. S., at 379; *id.*, at 387 (Burger, C. J., concurring in part and dissenting in part) (objecting to "enormous new regulatory burdens called for by" *Bates*). As a general matter, evaluating a targeted advertisement does not require specific information about the recipient's identity and legal problems any more than evaluating a newspaper advertisement requires like information about all readers. If the targeted letter specifies facts that relate to particular recipients (*e. g.*, "It has come to my attention that your home is being foreclosed on"), the reviewing agency has innumerable options to minimize mistakes. It might, for example, require the lawyer to prove the truth of the fact stated (by supplying copies of the court documents or material that led the lawyer to the fact); it could require the lawyer to explain briefly how he or she discovered the fact and verified its accuracy; or it could require the letter to bear a label identifying it as an advertisement, see *id.*, at 384 (dictum); *In re R. M. J.*, *supra*, at 206, n. 20, or directing the recipient how to report inaccurate or misleading letters. To be sure, a state agency or bar association that reviews solicitation letters might have more work than one that does not. But "[o]ur recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer*, 471 U. S., at 646.

III

The validity of Rule 7.3 does not turn on whether petitioner's letter itself exhibited any of the evils at which Rule 7.3 was directed. See *Ohralik*, 436 U. S., at 463–464, 466. Since, however, the First Amendment overbreadth doctrine does not apply to professional advertising, see *Bates*, 433 U. S., at 379–381, we address respondent's contentions that petitioner's letter is particularly overreaching, and therefore unworthy of First Amendment protection. *Id.*, at 381. In that regard, respondent identifies two features of the letter before us that, in its view, coalesce to convert the proposed letter into "high pressure solicitation, overbearing solicitation," Brief for Respondent 20, which is not protected. First, respondent asserts that the letter's liberal use of underscored, uppercase letters (*e. g.*, "Call *NOW*, don't wait"; "it is *FREE*, there is *NO* charge for calling") "fairly shouts at the recipient . . . that he should employ Shapero." *Id.*, at 19. See also Brief in Opposition 11 ("Letters of solicitation which shout commands to the individual, targeted recipient in words in underscored capitals are of a different order from advertising and are subject to proscription"). Second, respondent objects that the letter contains assertions (*e. g.*, "It may surprise you what I may be able to do for you") that "stat[e] no affirmative or objective fact," but constitute "pure salesman puffery, enticement for the unsophisticated, which commits Shapero to nothing." Brief for Respondent 20.

The pitch or style of a letter's type and its inclusion of subjective predictions of client satisfaction might catch the recipient's attention more than would a bland statement of purely objective facts in small type. But a truthful and nondeceptive letter, no matter how big its type and how much it speculates can never "shou[t] at the recipient" or "gras[p] him by the lapels," *id.*, at 19, as can a lawyer engaging in face-to-face solicitation. The letter simply presents no comparable risk of overreaching. And so long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient. Moreover, the First Amendment limits the State's authority to dictate what information an attorney may convey in soliciting legal business. "[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may also be presented in a way that is not deceptive," unless the State "assert[s] a substantial interest" that such a restriction would directly advance. *In re R. M. J.*, 455 U. S., at 203. Nor may a State impose a more particularized restriction without a similar showing. Aside from the interests that we have already rejected, respondent offers none.

To be sure, a letter may be misleading if it unduly emphasizes trivial or "relatively uninformative fact[s]," *In re R. M. J.*, *supra*, at 205 (lawyer's statement, "in large capital letters, that he was a member of the Bar of the Supreme Court of the United States"), or offers overblown assurances of client satisfaction, cf. *In re Von Wiegen*, 63 N. Y. 2d 163, 179, 470 N. E. 2d 838, 847 (1984) (solicitation letter to victims of massive disaster informs them that "it is [the lawyer's] opinion that the liability of the defendants is clear"), cert. denied, 472 U. S. 1007 (1985); *Bates*, *supra*, at 383–384 ("[A]dvertising claims as to the quality of legal services . . . may be so likely to be misleading as to warrant restriction"). Respondent does not argue before us that petitioner's letter was misleading in those respects. Nor does respondent contend that the letter is false or misleading in any other respect. Of course, respondent is free to raise, and the Kentucky courts are free to consider, any such argument on remand.

The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE STEVENS joins, concurring in part and dissenting in part.

I agree with Parts I and II of the Court's opinion, but am of the view that the matters addressed in Part III should be left to the state courts in the first instance.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

Relying primarily on *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985), the Court holds that States may not prohibit a form of attorney advertising that is potentially more pernicious than the advertising at issue in that case. I agree with the Court that the reasoning in *Zauderer* supports the conclusion reached today. That decision, however, was itself the culmination of a line of cases built on defective premises and flawed reasoning. As today's decision illustrates, the Court has been unable or unwilling to restrain the logic of the underlying analysis within reasonable bounds. The resulting interference with important and valid public policies is so destructive that I believe the analytical framework itself should now be reexamined.

I

Zauderer held that the First Amendment was violated by a state rule that forbade attorneys to solicit or accept employment through advertisements containing information or advice regarding a specific legal problem. See *id.*, at 639–647.

I dissented from this holding because I believed that our precedents permitted, and good judgment required, that we give greater deference to the States' legitimate efforts to regulate advertising by their attorneys. Emphasizing the important differences between professional services and standardized consumer products, I concluded that unsolicited legal advice was not analogous to the free samples that are often used to promote sales in other contexts. First, the quality of legal services is typically more difficult for most laypersons to evaluate, and the consequences of a mistaken evaluation of the "free sample" may be much more serious. For that reason, the practice of offering unsolicited legal advice as a means of enticing potential clients into a professional relationship is much more likely to be misleading than superficially similar practices in the sale of ordinary consumer goods. Second, and more important, an attorney has an obligation to provide clients with complete and disinterested advice. The advice contained in unsolicited "free samples" is likely to be colored by the lawyer's own interest in drumming up business, a result that is sure to undermine the professional standards that States have a substantial interest in maintaining.

Zauderer dealt specifically with a newspaper advertisement. Today's decision—which invalidates a similar rule against targeted, direct-mail advertising—wraps the protective mantle of the Constitution around practices that have even more potential for abuse. First, a personalized letter is somewhat more likely "to overpower the will and judgment of laypeople who have not sought [the lawyer's] advice." *Zauderer, supra,* at 678 (O'CONNOR, J., concurring in part, concurring in judgment in part, and dissenting in part). For people whose formal contacts with the legal system are infrequent, the authority of the law itself may tend to cling to attorneys just as it does to police officers. Unsophisticated citizens, understandably intimidated by the courts and their officers, may therefore find it much more difficult to ignore an apparently "personalized" letter from an attorney than to ignore a general advertisement.

Second, "personalized" form letters are designed to suggest that the sender has some significant personal knowledge about, and concern for, the recipient. Such letters are reasonably transparent when they come from somebody selling consumer goods or stock market tips, but they may be much more misleading when the sender belongs to a profession whose members are ethically obliged to put their clients' interests ahead of their own.

Third, targeted mailings are more likely than general advertisements to contain advice that is unduly tailored to serve the pecuniary interests of the lawyer. Even if such mailings are reviewed in advance by a regulator, they will rarely be seen by the bar in general. Thus, the lawyer's professional colleagues will not have the chance to observe how the desire to sell oneself to potential customers has been balanced against the duty to provide objective legal advice. An attorney's concern with maintaining a good reputation in the professional community, which may in part be motivated by long-term pecuniary interests, will therefore provide less discipline in this context than in the case of general advertising.

Although I think that the regulation at issue today is even more easily defended than the one at issue in *Zauderer*, I agree that the rationale for that decision may fairly be extended to cover today's case. Targeted direct-mail advertisements—like general advertisements but unlike the kind of in-person solicitation that may be banned under *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978)—can at least theoretically be regulated by the States through prescreening mechanisms. In-person solicitation, moreover, is inherently more prone to abuse than almost any form of written communication. *Zauderer* concluded that the decision in *Ohralik* was limited by these "unique features" of in-person solicitation, see 471 U. S., at 641, and today's majority simply applies the logic of that interpretation of *Ohralik* to the case before us.

II

Attorney advertising generally falls under the rubric of "commercial speech." Political speech, we have often noted, is at the core of the First Amendment. See, *e. g.*, *Boos* v. *Barry*, 485 U. S. 312, 318 (1988). One reason for the special status of political speech was suggested in a metaphor that has become almost as familiar as the principle that it sought to justify: "[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting). Cf., *e. g.*, *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 50–51 (1988). Traditionally, the constitutional fence around this metaphorical marketplace of ideas had not shielded the actual marketplace of purely commercial transactions from governmental regulation.

In *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976), however, the Court concluded that the First Amendment protects the communication of the following so-called "idea": "I will sell you the X prescription drug at the Y price." See *id.*, at 761. The Court argued that the public interest requires that private economic decisions be well informed, and it suggested that no satisfactory line could be drawn between ideas about public affairs and information relevant to such private decisions. *Id.*, at 762–765. The dissent observed that the majority had overstated the difficulties of distinguishing public affairs from such matters as the "decision . . . to purchase one or another kind of shampoo." *Id.*, at 787 (REHNQUIST, J., dissenting). The dissent also foresaw that the logic of *Virginia Pharmacy* would almost necessarily extend to advertising by physicians and attorneys. *Id.*, at 785. This prediction soon proved correct, see *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977), and subsequent decisions have radically curtailed the power of the States to forbid conduct that I believe "promote[s] distrust of lawyers and disrespect for our own system of justice." *Id.*, at 394 (Powell, J., concurring in part and dissenting in part).

The latest developments, in *Zauderer* and now today, confirm that the Court should apply its commercial speech doctrine with more discernment than it has shown in these cases. Decisions subsequent to *Virginia Pharmacy* and *Bates*, moreover, support the use of restraint in applying this doctrine to attorney advertising. We have never held, for example, that commercial speech has the same constitutional status as speech on matters of public policy, and the Court has consistently purported to review laws regulating commercial speech under a significantly more deferential standard of review.

> "Expression concerning purely commercial transactions has come within the ambit of the [First] Amendment's protection only recently. . . . To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik* v. *Ohio State Bar Assn.*, *supra*, at 455–456 (footnote omitted).

A standardized legal test has been devised for commercial speech cases. Under that test, such speech is entitled to constitutional protection only if it concerns lawful activities and is not misleading; if the speech is protected, government may still ban or regulate it by laws that directly advance a substantial governmental interest and are appropriately tailored to that purpose. See *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 566 (1980). Applying that test to attorney advertising, it is clear to me that the States should have considerable latitude to ban advertising that is "*potentially* or demonstrably misleading," *In re R. M. J.*, 455 U. S. 191, 202 (1982) (emphasis added), *as well as* truthful advertising that undermines the substantial governmental interest in promoting the high ethical standards that are necessary in the legal profession.

Some forms of advertising by lawyers might be protected under this test. Announcing the price of an initial consultation might qualify, for example, especially if appropriate disclaimers about the costs of other services were included. Even here, the inherent difficulties of policing such advertising suggest that we should hesitate to interfere with state rules designed to ensure that adequate disclaimers are included and that such advertisements are suitably restrained.

As soon as one steps into the realm of prices for "routine" legal services such as uncontested divorces and personal bankruptcies, however, it is quite clear to me that the States may ban such advertising completely. The contrary decision in *Bates* was in my view inconsistent with the standard test that is now applied in commercial speech cases. Until one becomes familiar with a client's particular problems, there is simply no way to know that one is dealing with a "routine" divorce or bankruptcy. Such an advertisement is therefore inherently misleading if it fails to inform potential clients that they are not necessarily qualified to decide whether their own apparently simple problems can be handled by "routine" legal services. Furthermore, such advertising practices will undermine professional standards if the attorney accepts the economic risks of offering fixed rates for solving apparently simple problems that will sometimes prove not to be so simple after all. For a lawyer to promise the world that such matters as uncontested divorces can be handled for a flat fee will inevitably create incentives to ignore (or avoid discovering) the complexities that would lead a conscientious attorney to treat some clients' cases as anything but routine. It may be possible to devise workable rules that would allow something more than the most minimal kinds of price advertising by attorneys. That task, however, is properly left to the States, and it is certainly not a fit subject for constitutional adjudication. Under the *Central Hudson* test, government has more than ample justification for banning or strictly regulating most forms of price advertising.

Solicitation practices like the "free sample" techniques approved by *Zauderer* and today's decision are even less deserving of constitutional protection than price advertising for supposedly routine legal services. Applying the *Central Hudson* test to the regulation at issue today, for example, I think it clear that Kentucky has a substantial interest in preventing the potentially misleading effects of targeted, direct-mail advertising as well as the corrosive effects that such advertising can have on appropriate professional standards. Soliciting business from strangers who appear to need particular legal services, when a significant motive for the offer is the lawyer's pecuniary gain, always has a tendency to corrupt the solicitor's professional judgment. This is especially true when the solicitation includes the offer of a "free sample," as petitioner's proposed letter does. I therefore conclude that American Bar Association Model Rule of Professional Conduct 7.3 (1984) sweeps no more broadly than is necessary to advance a substantial governmental interest. See *Central Hudson*, *supra*, at 566. The Kentucky Supreme Court correctly found that petitioner's letter could permissibly be banned under Rule 7.3, and I dissent from the Court's decision to reverse that judgment.

III

The roots of the error in our attorney advertising cases are a defective analogy between professional services and standardized consumer products and a correspondingly inappropriate skepticism about the States' justifications for their regulations. In *Bates*, for example, the majority appeared to demand conclusive proof that the country would be better off if the States were allowed to retain a rule that served "to inhibit the free flow of commercial information and to keep the public in ignorance." 433 U. S., at 365. Although the opinion contained extensive discussion of the proffered justifications for restrictions on price advertising, the result was little more than a bare conclusion that "we are not persuaded that price advertising will harm consumers." See *id.*, at 368–379. Dismissing Justice Powell's careful critique of the implicit legislative factfinding that underlay its analysis, the *Bates* majority simply insisted on concluding that the benefits of advertising outweigh its dangers. Compare *id.*, at 373, n. 28, with *id.*, at 391–400 (Powell, J., concurring in part and dissenting in part). In my view, that policy decision was not derived from the First Amendment, and it should not have been used to displace a different and no less reasonable policy decision of the State whose regulation was at issue.

Bates was an early experiment with the doctrine of commercial speech, and it has proved to be problematic in its application. Rather than continuing to work out all the consequences of its approach, we should now return to the States the legislative function that has so inappropriately been taken from them in the context of attorney advertising. The *Central Hudson* test for commercial speech provides an adequate doctrinal basis for doing so, and today's decision confirms the need to reconsider *Bates* in the light of that doctrine.

Even if I agreed that this Court should take upon itself the task of deciding what forms of attorney advertising are in the public interest, I would not agree with what it has done. The best arguments in favor of rules permitting attorneys to advertise are founded in elementary economic principles. See, *e. g.*, Hazard, Pearce, & Stempel, Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services, 58 N. Y. U. L. Rev. 1084 (1983). Restrictions on truthful advertising, which artificially interfere with the ability of suppliers to transmit price information to consumers, presumably reduce the efficiency of the mechanisms of supply and demand. Other factors being equal, this should cause or enable suppliers (in this case attorneys) to maintain a price/quality ratio in some of their services that is higher than would otherwise prevail. Although one could probably not test this hypothesis empirically, it is inherently plausible. Nor is it implausible to imagine that one effect of restrictions on lawyer advertising, and perhaps sometimes an intended effect, is to enable attorneys to charge their clients more for some services (of a given quality) than they would be able to charge absent the restrictions.

Assuming, *arguendo*, that the removal of advertising restrictions should lead in the short run to increased efficiency in the provision of legal services, I would not agree that we can safely assume the same effect in the long run. The economic argument against these restrictions ignores the delicate role they may play in preserving the norms of the legal profession. While it may be difficult to defend this role with precise economic logic, I believe there is a powerful argument in favor of restricting lawyer advertising and that this argument is at the very least not easily refuted by economic analysis.

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life. Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms. This view of the legal profession need not be rooted in romanticism or self-serving sanctimony, though of course it can be. Rather, special ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a political system like ours.

It is worth recalling why lawyers are regulated at all, or to a greater degree than most other occupations, and why history is littered with failed attempts to extinguish lawyers as a special class. See generally R. Pound, The Lawyer from Antiquity to Modern Times (1953). Operating a legal system that is both reasonably efficient and tolerably fair cannot be accomplished, at least under modern social conditions, without a trained and specialized body of experts. This training is one element of what we mean when we refer to the law as a "learned profession." Such knowledge by its nature cannot be made generally available, and it therefore confers the power and the temptation to manipulate the system of justice for one's own ends. Such manipulation can occur in at least two obvious ways. One results from overly zealous representation of the client's interests; abuse of the discovery process is one example whose causes and effects (if not its cure) is apparent. The second, and for present purposes the more relevant, problem is abuse of the client for the lawyer's benefit. Precisely because lawyers must be provided with expertise that is both esoteric and extremely powerful, it would be unrealistic to demand that clients bargain for their services in the same arm's-length manner that may be appropriate when buying an automobile or choosing a dry cleaner. Like physicians, lawyers are subjected to heightened ethical demands on their conduct towards those they serve. These demands are needed because market forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers of their necessary services from the peculiar power of the specialized knowledge that these professionals possess.

Imbuing the legal profession with the necessary ethical standards is a task that involves a constant struggle with the relentless natural force of economic self-interest. It cannot be accomplished directly by legal rules, and it certainly will not succeed if sermonizing is the strongest tool that may be employed. Tradition and experiment have suggested a number of formal and informal mechanisms, none of which is adequate by itself and many of which may serve to reduce competition (in the narrow economic sense) among members of the profession. A few examples include the great efforts made during this century to improve the quality and breadth of the legal education that is required for admission to the bar; the concomitant attempt to cultivate a subclass of genuine scholars within the profession; the development of bar associations that aspire to be more than trade groups; strict disciplinary rules about conflicts of interest and client abandonment; and promotion of the expectation that an attorney's history of voluntary public service is a relevant factor in selecting judicial candidates.

Restrictions on advertising and solicitation by lawyers properly and significantly serve the same goal. Such restrictions act as a concrete, day-to-day reminder to the practicing attorney of why it is improper for any member of this profession to regard it as a trade or occupation like any other. There is no guarantee, of course, that the restrictions will always have the desired effect, and they are surely not a sufficient means to their proper goal. Given their inevitable anticompetitive effects, moreover, they should not be thoughtlessly retained or insulated from skeptical criticism. Appropriate modifications have been made in the light of reason and experience, and other changes may be suggested in the future.

In my judgment, however, fairly severe constraints on attorney advertising can continue to play an important role in preserving the legal profession as a genuine profession. Whatever may be the exactly appropriate scope of these restrictions at a given time and place, this Court's recent decisions reflect a myopic belief that "consumers," and thus our Nation, will benefit from a constitutional theory that refuses to recognize either the essence of professionalism or its fragile and necessary foundations. Compare, *e. g.*, *Bates*, 433 U. S., at 370–372, with *id.*, at 400–401, and n. 11 (Powell, J., concurring in part and dissenting in part). In one way or another, time will uncover the folly of this approach. I can only hope that the Court will recognize the danger before it is too late to effect a worthwhile cure.

ALLIED TUBE & CONDUIT CORP. *v.* INDIAN HEAD, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 87-157. Argued February 24, 1988—Decided June 13, 1988

The National Fire Protection Association—a private organization that includes members representing industry, labor, academia, insurers, organized medicine, firefighters, and government—sets and publishes product standards and codes related to fire protection. Its National Electrical Code (Code), which establishes requirements for the design and installation of electrical wiring systems, is routinely adopted into law by a substantial number of state and local governments, and is widely adopted as setting acceptable standards by private product-certification laboratories, insurance underwriters, and electrical inspectors, contractors, and distributors. Throughout the relevant period, the Code permitted the use of electrical conduit made of steel. Respondent, a manufacturer of plastic conduit, initiated a proposal before the Association to extend Code approval to plastic conduit as well. The proposal was approved by one of the Association's professional panels, and thus could be adopted into the Code by a simple majority of the members attending the Association's 1980 annual meeting. Before the meeting was held, petitioner, the Nation's largest producer of steel conduit, members of the steel industry, other steel conduit manufacturers, and independent sales agents collectively agreed to exclude respondent's product from the 1981 Code by packing the annual meeting with new Association members whose only function was to vote against respondent's proposal. After the proposal was defeated at the meeting and an appeal to the Association's Board of Directors was denied, respondent brought suit in Federal District Court, alleging that petitioner and others had unreasonably restrained trade in the electrical conduit market in violation of § 1 of the Sherman Act. The jury found petitioner liable, but the court granted a judgment n.o.v. for petitioner, reasoning that it was entitled to antitrust immunity under the doctrine of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127. The Court of Appeals reversed.

Held: Noerr antitrust immunity does not apply to petitioner. Pp. 499–510.

(a) The scope of *Noerr* protection depends on the source, context, and nature of the anticompetitive restraint at issue. Where a restraint is the result of valid governmental action, as opposed to private action, those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. In this case, the relevant context is the standard-setting process of a private association without official authority that includes members having horizontal and vertical business relations and economic incentives to restrain competition. Such an association cannot be treated as a "quasi-legislative" body simply because legislatures routinely adopt its Code, and thus petitioner does not enjoy the immunity afforded those who merely urge the government to restrain trade. Pp. 499–502.

(b) Nor does *Noerr* immunity apply to petitioner on the theory that the exclusion of plastic conduit from the Code, and the effect that exclusion had of its own force in the marketplace, were incidental to a valid effort to influence governmental action. Although, because a large number of governments routinely adopt the Code into law, efforts to influence the Association's standard-setting process are arguably the most effective means of influencing legislation regulating electrical conduit, and although *Noerr* immunity is not limited to "direct" petitioning of government officials, the *Noerr* doctrine does not immunize every concerted activity that is genuinely intended to influence governmental action. There is no merit to the argument that, regardless of the Association's nonlegislative status, petitioner's efforts to influence the Association must be given the same wide berth accorded legislative lobbying or efforts to influence legislative action in the political arena. Pp. 502–504.

(c) Unlike the publicity campaign to influence legislation in *Noerr*, petitioner's activity did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but took place within the confines of a private standard-setting process. The validity of petitioner's efforts to influence the Code is not established, without more, by petitioner's literal compliance with the Association's rules, for the hope of the Code's procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition. An association cannot validate the anticompetitive activities of its members simply by adopting rules that fail to provide such safeguards. At least where, as here, an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace. Pp. 505–510.

817 F. 2d 938, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and MARSHALL, BLACKMUN, STEVENS, SCALIA, and KENNEDY, JJ., joined. WHITE, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 511.

Marvin E. Frankel argued the cause for petitioner. With him on the briefs were *Robert M. Heller, Arthur B. Kramer*, and *Debora K. Grobman*.

Fredric W. Yerman argued the cause for respondent. With him on the brief were *Michael Malina, Randolph S. Sherman*, and *Richard A. De Sevo*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Illinois by *Neil F. Hartigan*, Attorney General, and *Robert E. Davy, Jr.*, Assistant Attorney General; and for the Western Fire Chiefs Association et al. by *William J. Meeske* and *Alexander D. Thomson*.

Briefs of *amici curiae* urging affirmance were filed for the United States et al. by *Solicitor General Fried, Assistant Attorney General Rule, Deputy Solicitor General Cohen, Deputy Assistant Attorney General Starling, Paul J. Larkin, Jr., Robert B. Nicholson, John J. Powers III, Marion L. Jetton, Robert D. Paul*, and *Ernest J. Isenstadt;* and for the State of Alaska et al. by *Robert Abrams*, Attorney General of New York, *O. Peter Sherwood*, Solicitor General, and *Lloyd E. Constantine, Susan Beth Farmer, Elizabeth M. O'Neill*, and *George W. Sampson*, Assistant Attorneys General, *Grace Berg Schaible*, Attorney General of Alaska, *Richard D. Monkmon*, Assistant Attorney General, *Robert K. Corbin*, Attorney General of Arizona, *John Steven Clark*, Attorney General of Arkansas, *Jeffrey A. Bell*, Deputy Attorney General, *John Van de Kamp*, Attorney General of California, *Andrea Ordin*, Chief Assistant Attorney General, *Thomas P. Dove*, Deputy Attorney General, *Duane Woodard*, Attorney General of Colorado, *Thomas P. McMahon*, First Assistant Attorney General, *Joseph I. Lieberman*, Attorney General of Connecticut, *Robert M. Langer*, Assistant Attorney General, *Warren Price III*, Attorney General of Hawaii, *Robert A. Marks*, Supervising Deputy Attorney General, *Thomas J. Miller*, Attorney General of Iowa, *John Perkins*, Deputy Attorney General, *James E. Tierney*, Attorney General of Maine, *Stephen L. Wessler*, Assistant Attorney General, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Michael F. Brockmeyer*, Assistant Attorney General, *Frank J. Kelley*, Attorney General of Michigan, *Louis J. Caruso*, Solicitor General, *Robert C. Ard, Jr.*, Assistant Attorney General, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Cary Edwards*, Attorney General of New Jersey, *Laurel A. Price*, Deputy Attorney General, *Lacy H. Thornburg*, Attorney General of North Carolina, *Richard H. Carlton*, Assistant Attorney General, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Dave*

JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner contends that its efforts to affect the product standard-setting process of a private association are immune from antitrust liability under the *Noerr* doctrine primarily because the association's standards are widely adopted into law by state and local governments. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961) *(Noerr)*. The United States Court of Appeals for the Second Circuit held that *Noerr* immunity did not apply. We affirm.

I

The National Fire Protection Association (Association) is a private, voluntary organization with more than 31,500 individual and group members representing industry, labor, academia, insurers, organized medicine, firefighters, and government. The Association, among other things, publishes product standards and codes related to fire protection through a process known as "consensus standard making." One of the codes it publishes is the National Electrical Code (Code), which establishes product and performance requirements for the design and installation of electrical wiring systems. Revised every three years, the Code is the most influential electrical code in the nation. A substantial number of state and local governments routinely adopt the Code into law with little or no change; private certification laboratories, such as Underwriters Laboratories, normally will not list and label

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Frohnmayer, Attorney General of Oregon, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Eugene F. Wayne*, Chief Deputy Attorney General, *James E. O'Neil*, Attorney General of Rhode Island, *Roger A. Tellinghuisen*, Attorney General of South Dakota, *Jim Mattox*, Attorney General of Texas, *Mary F. Keller*, Executive Assistant Attorney General, *John J. White*, Assistant Attorney General, *David L. Wilkinson*, Attorney General of Utah, *Kenneth O. Eikenberry*, Attorney General of Washington, *John R. Ellis*, Deputy Attorney General, *Tina Kondo*, Assistant Attorney General, *Charles G. Brown*, Attorney General of West Virginia, *Mark D. Kindt*, Deputy Attorney General, *Donald J. Hanaway*, Attorney General of Wisconsin, and *Kevin J. O'Connor*, Assistant Attorney General.

an electrical product that does not meet Code standards; many underwriters will refuse to insure structures that are not built in conformity with the Code; and many electrical inspectors, contractors, and distributors will not use a product that falls outside the Code.

Among the electrical products covered by the Code is electrical conduit, the hollow tubing used as a raceway to carry electrical wires through the walls and floors of buildings. Throughout the relevant period, the Code permitted using electrical conduit made of steel, and almost all conduit sold was in fact steel conduit. Starting in 1980, respondent began to offer plastic conduit made of polyvinyl chloride. Respondent claims its plastic conduit offers significant competitive advantages over steel conduit, including pliability, lower installed cost, and lower susceptibility to short circuiting. In 1980, however, there was also a scientific basis for concern that, during fires in high-rise buildings, polyvinyl chloride conduit might burn and emit toxic fumes.

Respondent initiated a proposal to include polyvinyl chloride conduit as an approved type of electrical conduit in the 1981 edition of the Code. Following approval by one of the Association's professional panels, this proposal was scheduled for consideration at the 1980 annual meeting, where it could be adopted or rejected by a simple majority of the members present. Alarmed that, if approved, respondent's product might pose a competitive threat to steel conduit, petitioner, the Nation's largest producer of steel conduit, met to plan strategy with, among others, members of the steel industry, other steel conduit manufacturers, and its independent sales agents. They collectively agreed to exclude respondent's product from the 1981 Code by packing the upcoming annual meeting with new Association members whose only function would be to vote against the polyvinyl chloride proposal.

Combined, the steel interests recruited 230 persons to join the Association and to attend the annual meeting to vote against the proposal. Petitioner alone recruited 155 persons—including employees, executives, sales agents, the agents' employees, employees from two divisions that did not sell electrical products, and the wife of a national sales director. Petitioner and the other steel interests also paid over $100,000 for the membership, registration, and attendance expenses of these voters. At the annual meeting, the steel group voters were instructed where to sit and how and when to vote by group leaders who used walkie-talkies and hand signals to facilitate communication. Few of the steel group voters had any of the technical documentation necessary to follow the meeting. None of them spoke at the meeting to give their reasons for opposing the proposal to approve polyvinyl chloride conduit. Nonetheless, with their solid vote in opposition, the proposal was rejected and returned to committee by a vote of 394 to 390. Respondent appealed the membership's vote to the Association's Board of Directors, but the Board denied the appeal on the ground that, although the Association's rules had been circumvented, they had not been violated.[1]

In October 1981, respondent brought this suit in Federal District Court, alleging that petitioner and others had unreasonably restrained trade in the electrical conduit market in violation of § 1 of the Sherman Act. 26 Stat. 209, 15 U. S. C. § 1. A bifurcated jury trial began in March 1985. Petitioner conceded that it had conspired with the other steel interests to exclude respondent's product from the Code and that it had a pecuniary interest to do so. The jury, instructed under the rule of reason that respondent carried the burden of showing that the anticompetitive effects of petitioner's actions outweighed any procompetitive benefits of standard setting, found petitioner liable. In answers to special interrogatories, the jury found that petitioner did not violate any rules of the Association and acted, at least in part, based on a genuine belief that plastic conduit was unsafe, but that petitioner nonetheless did "subvert" the consensus standard-making process of the Association. App. 23–24. The jury also made special findings that petitioner's actions had an adverse impact on competition, were not the least restrictive means of expressing petitioner's opposition to the use of polyvinyl chloride conduit in the marketplace, and unreasonably restrained trade in violation of the antitrust laws. The jury then awarded respondent damages, to be trebled, of $3.8 million for lost profits resulting from the effect that excluding polyvinyl chloride conduit from the 1981 Code had of its own force in the marketplace. No damages were awarded for injuries stemming from the adoption of the 1981 Code by governmental entities.[2]

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[1] Respondent also sought a tentative interim amendment to the Code, but that was denied on the ground that there was not sufficient exigency to merit an interim amendment. The Association subsequently approved use of polyvinyl chloride conduit for buildings of less than three stories in the 1984 Code, and for all buildings in the 1987 Code.

The District Court then granted a judgment n.o.v. for petitioner, reasoning that *Noerr* immunity applied because the Association was "akin to a legislature" and because petitioner, "by the use of methods consistent with acceptable standards of political action, genuinely intended to influence the [Association] with respect to the National Electrical Code, and to thereby influence the various state and local legislative bodies which adopt the [Code]." App. to Pet. for

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[2] Although the District Court was of the view that at trial respondent relied solely on the theory that its injury "flowed from legislative action," App. to Pet. for Cert. 31a, the Court of Appeals determined that respondent was awarded damages *only* on the theory "that the stigma of not obtaining [Code] approval of its products and [petitioner's] 'marketing' of that stigma caused independent marketplace harm to [respondent] in those jurisdictions *permitting* use of [polyvinyl chloride] conduit, as well as those which later adopted the 1984 [Code], which permitted use of [polyvinyl chloride] conduit in buildings less than three stories high. [Respondent] did *not* seek redress for any injury arising from the adoption of the [Code] by the various governments." 817 F. 2d 938, 941, n. 3 (1987) (emphasis added). We decide the case as it was framed by the Court of Appeals.

Cert. 28a, 30a. The Court of Appeals reversed, rejecting both the argument that the Association should be treated as a "quasi-legislative" body because legislatures routinely adopt the Code and the argument that efforts to influence the Code were immune under *Noerr* as indirect attempts to influence state and local governments. 817 F. 2d 938 (1987). We granted certiorari to address important issues regarding the application of *Noerr* immunity to private standard-setting associations.[3] 484 U. S. 814 (1987).

II

Concerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability under the doctrine established by *Noerr; Mine Workers* v. *Pennington,* 381 U. S. 657, 669–672 (1965); and *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508 (1972). The scope of this protection depends, however, on the source, context, and nature of the anticompetitive restraint at issue. "[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action," those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. *Noerr,* 365 U. S., at 136; see also *Pennington, supra,* at 671. In addition, where, independent of any government action, the anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is "incidental" to a valid effort to influence governmental action. *Noerr, supra,* at 143. The validity of such efforts, and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity. A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods. *Noerr*, *supra*, at 140–141. But in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations.[4] *California Motor Transport*, *supra*, at 512–513.

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[3] We also granted certiorari on the issue whether, if not immune under *Noerr,* petitioner's conduct violated the Sherman Act, but we now vacate our grant of that issue as improvident.

In this case, the restraint of trade on which liability was predicated was the Association's exclusion of respondent's product from the Code, and no damages were imposed for the incorporation of that Code by any government. The relevant context is thus the standard-setting process of a private association. Typically, private standard-setting associations, like the Association in this case, include members having horizontal and vertical business relations. See generally 7 P. Areeda, Antitrust Law ¶1477, p. 343 (1986) (trade and standard-setting associations routinely treated as continuing conspiracies of their members). There is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm.[5] See *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U. S. 556, 571 (1982). Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny. See, *e. g.*, *ibid.*; *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656 (1961) *(per curiam)*. See also *FTC* v. *Indiana Federation of Dentists*,

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[4] Of course, in whatever forum, private action that is not genuinely aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action. *Noerr*, 365 U. S., at 144; *California Motor Transport*, 404 U. S., at 511.

[5] "Product standardization might impair competition in several ways. . . . [It] might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals' ability to monitor each other's prices." 7 P. Areeda, Antitrust Law ¶1503, p. 373 (1986).

476 U. S. 447 (1986). When, however, private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, cf. *Hydrolevel, supra,* at 570–573 (noting absence of "meaningful safeguards"), those private standards can have significant procompetitive advantages. It is this potential for procompetitive benefits that has led most lower courts to apply rule-of-reason analysis to product standard-setting by private associations.[6]

Given this context, petitioner does not enjoy the immunity accorded those who merely urge the government to restrain trade. We agree with the Court of Appeals that the Association cannot be treated as a "quasi-legislative" body simply because legislatures routinely adopt the Code the Association publishes. 817 F. 2d, at 943–944. Whatever *de facto* authority the Association enjoys, no official authority has been conferred on it by any government, and the decisionmaking body of the Association is composed, at least in part, of persons with economic incentives to restrain trade. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 707–708 (1962). See also *id.*, at 706–707; *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 791–792 (1975). "We may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." *Hallie* v. *Eau Claire*, 471 U. S. 34, 45 (1985). The dividing line between restraints resulting from governmental action and those resulting from private action may not always be obvious.[7] But where, as here, the restraint is imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition, we have no difficulty concluding that the restraint has resulted from private action.

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[6] See 2 J. von Kalinowski, Antitrust Laws and Trade Regulation §§ 6I.01[3], 6I.03, 6I.04, pp. 6I–6 to 6I–7, 6I–18 to 6I–29 (1981) (collecting cases). Concerted efforts to *enforce* (rather than just agree upon) private product standards face more rigorous antitrust scrutiny. See *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656, 659–660 (1961) *(per curiam).* See also *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U. S. 457 (1941).

Noerr immunity might still apply, however, if, as petitioner argues, the exclusion of polyvinyl chloride conduit from the Code, and the effect that exclusion had of its own force in the marketplace, were incidental to a valid effort to influence governmental action. Petitioner notes that the lion's share of the anticompetitive effect in this case came from the predictable adoption of the Code into law by a large number of state and local governments. See 817 F. 2d, at 939, n. 1. Indeed, petitioner argues that, because state and local governments rely so heavily on the Code and lack the resources or technical expertise to second-guess it, efforts to influence the Association's standard-setting process are the most effective means of influencing legislation regulating electrical conduit. This claim to *Noerr* immunity has some force. The effort to influence governmental action in this case certainly cannot be characterized as a sham given the actual adoption of the 1981 Code into a number of statutes and local ordinances. Nor can we quarrel with petitioner's contention that, given the widespread adoption of the Code into law, any effect the 1981 Code had in the marketplace of its own force was, in the main, incidental to petitioner's genuine effort to influence governmental action.[8] And, as petitioner persuasively argues, the claim of *Noerr* immunity cannot be dismissed on the ground that the conduct at issue involved no "direct" petitioning of government officials, for *Noerr* itself immunized a form of "indirect" petitioning. See *Noerr* (immunizing a publicity campaign directed at the general public on the ground that it was part of an effort to influence legislative and executive action).

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[7] See, *e. g., California Motor Transport, supra,* at 513 (stating in dicta that "[c]onspiracy with a licensing authority to eliminate a competitor" or "bribery of a public purchasing agent" may violate the antitrust laws); *Mine Workers* v. *Pennington,* 381 U. S. 657, 671, and n. 4 (1965) (holding that immunity applied but noting that the trade restraint at issue "was the act of a public official who is not claimed to be a co-conspirator" and contrasting *Continental Ore*); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U. S. 690, 707–708 (1962); 1 P. Areeda & D. Turner, Antitrust Law ¶ 206 (1978) (discussing the extent to which *Noerr* immunity should apply to commercial transactions involving the government). See also *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773, 791–792 (1975); *Continental Ore, supra,* at 706–707.

Nonetheless, the validity of petitioner's actions remains an issue. We cannot agree with petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. But see *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 456–463 (1945). Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. But see *Georgia* v. *Evans*, 316 U. S. 159 (1942). Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action. Immunity might even be claimed for anticompetitive mergers on the theory that they give the merging corporations added political clout. Nor is it necessarily dispositive that packing the Association's meeting may have been the most effective means of securing government action, for one could imagine situations where the most effective means of influencing government officials is bribery, and we have never suggested that that kind of attempt to influence the government merits protection. We thus conclude that the *Noerr* immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity.

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[8] The effect, independent of government action, that the 1981 Code had in the marketplace may to some extent have been exacerbated by petitioner's efforts to "market" the stigma respondent's product suffered by being excluded from the Code. See 817 F. 2d, at 941, n. 3. Given our disposition *infra*, we need not decide whether, or to what extent, these "marketing" efforts alter the incidental status of the resulting anticompetitive harm. See generally *Noerr*, 365 U. S., at 142 (noting that in that case there were "no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers").

Here petitioner's actions took place within the context of the standard-setting process of a private association. Having concluded that the Association is not a "quasi-legislative" body, we reject petitioner's argument that any efforts to influence the Association must be treated as efforts to influence a "quasi-legislature" and given the same wide berth accorded legislative lobbying. That rounding up supporters is an acceptable and constitutionally protected method of influencing elections does not mean that rounding up economically interested persons to set private standards must also be protected. Nor do we agree with petitioner's contention that, regardless of the Association's nonlegislative status, the effort to influence the Code should receive the same wide latitude given ethically dubious efforts to influence legislative action in the political arena, see *Noerr*, 365 U. S., at 140–141, simply because the ultimate aim of the effort to influence the private standard-setting process was (principally) legislative action. The ultimate aim is not dispositive. A misrepresentation to a court would not necessarily be entitled to the same antitrust immunity allowed deceptive practices in the political arena simply because the odds were very good that the court's decision would be codified—nor for that matter would misrepresentations made under oath at a legislative committee hearing in the hopes of spurring legislative action.

What distinguishes this case from *Noerr* and its progeny is that the context and nature of petitioner's activity make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves. True, in *Noerr* we immunized conduct that could be characterized as a conspiracy among railroads to destroy business relations between truckers and their customers. *Noerr, supra,* at 142. But we noted there:

> "There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. Moreover, all the evidence in the record, both oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws. Circulars, speeches, newspaper articles, editorials, magazine articles, memoranda and all other documents discuss in one way or another the railroads' charges that heavy trucks injure the roads, violate the laws and create traffic hazards, and urge that truckers should be forced to pay a fair share of the costs of rebuilding the roads, that they should be compelled to obey the laws, and that limits should be placed upon the weight of the loads they are permitted to carry." 365 U. S., at 142–143.

In light of those findings, we characterized the railroads' activity as a classic "attempt . . . to influence legislation by a campaign of publicity," an "inevitable" and "incidental" effect of which was "the infliction of some direct injury upon the interests of the party against whom the campaign is directed." *Id.*, at 143. The essential character of such a publicity campaign was, we concluded, political, and could not be segregated from the activity's impact on business. Rather, the plaintiff's cause of action simply embraced the inherent possibility in such political fights "that one group or the other will get hurt by the arguments that are made." *Id.*, at 144. As a political activity, special factors counseled against regulating the publicity campaign under the antitrust laws:

> "Insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical." *Id.*, at 140–141 (footnote omitted).

In *Noerr*, then, the political context and nature of the activity precluded inquiry into its antitrust validity.[9]

Here the context and nature of the activity do not counsel against inquiry into its validity. Unlike the publicity campaign in *Noerr*, the activity at issue here did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but within the confines of a private standard-setting process. The validity of conduct within that process has long been defined and circumscribed by the antitrust laws without regard to whether the private standards are likely to be adopted into law. See *supra*, at 500. Indeed, because private standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits, see *ibid.*, the standards of conduct in this context are, at least in some respects, more rigorous than the standards of conduct prevailing in the partisan political arena or in the adversarial process of adjudication. The activity at issue here thus cannot, as in *Noerr*, be characterized as an activity that has traditionally been regulated with extreme caution, see *Noerr*, 365 U. S., at 141, or as an activity that "bear[s] little if any resemblance to the combinations normally held violative of the Sherman Act," *id.*, at 136. And petitioner did not confine itself to efforts to persuade an independent decisionmaker, cf. *id.*, at 138, 139 (describing the immunized conduct as "mere solicitation"); rather, it organized and orchestrated the actual exercise of the Association's decisionmaking authority in setting a standard. Nor can the setting of the Association's Code be characterized as merely an exercise of the power of persuasion, for it in part involves the exercise of market power. The Association's members, after all, include consumers, distributors, and manufacturers of electrical conduit, and any agreement to exclude polyvinyl chloride conduit from the Code is in part an implicit agreement not to trade in that type of electrical conduit. Cf. *id.*, at 136. Although one could reason backwards from the legislative impact of the Code to the conclusion that the conduct at issue here is "political," we think that, given the context and nature of the conduct, it can more aptly be characterized as commercial activity with a political impact. Just as the antitrust laws should not regulate political activities "simply because those activities have a commercial impact," *id.*, at 141, so the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact.[10]

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[9] Similarly in *California Motor Transport* any antitrust review of the validity of the activity at issue was limited and structured by the fact that there the antitrust defendants were "us[ing] the channels and procedures of state and federal agencies and courts." 404 U. S., at 511; see also *id.*, at 512–513.

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[10] It is admittedly difficult to draw the precise lines separating anticompetitive political activity that is immunized despite its commercial impact from anticompetitive commercial activity that is unprotected despite

NAACP v. *Claiborne Hardware Co.*, 458 U. S. 886 (1982), is not to the contrary. In that case we held that the First Amendment protected the nonviolent elements of a boycott of white merchants organized by the National Association for the Advancement of Colored People and designed to make white government and business leaders comply with a list of demands for equality and racial justice. Although the boycotters intended to inflict economic injury on the merchants, the boycott was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution, and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market. *Id.*, at 914–915. Here, in con-

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its political impact, and this is itself a case close to the line. For that reason we caution that our decision today depends on the context and nature of the activity. Although criticizing the uncertainty of such a particularized inquiry, *post*, at 513, the dissent does not dispute that the types of activity we describe *supra*, at 503–504, could not be immune under *Noerr* and fails to offer an intelligible alternative for distinguishing those nonimmune activities from the activity at issue in this case. Rather, the dissent states without elaboration that the sham exception "is enough to guard against flagrant abuse," *post*, at 516, apparently embracing the conclusion of the United States Court of Appeals for the Ninth Circuit that the sham exception covers the activity of a defendant who "genuinely seeks to achieve his governmental result, but does so *through improper means*." *Sessions Tank Liners, Inc.* v. *Joor Mfg., Inc.*, 827 F. 2d 458, 465, n. 5 (1987) (emphasis in original). Such a use of the word "sham" distorts its meaning and bears little relation to the sham exception *Noerr* described to cover activity that was not genuinely intended to influence governmental action. 365 U. S., at 144. See also P. Areeda & H. Hovenkamp, Antitrust Law ¶203.1a, pp. 13–14 (Supp. 1987). More importantly, the Ninth Circuit's approach renders "sham" no more than a label courts could apply to activity they deem unworthy of antitrust immunity (probably based on unarticulated consideration of the nature and context of the activity), thus providing a certain superficial certainty but no real "intelligible guidance" to courts or litigants. *Post*, at 513. Indeed, the Ninth Circuit concluded that the very activity the dissent deems protected was an unprotected "sham." 827 F. 2d, at 465.

trast, petitioner was at least partially motivated by the desire to lessen competition, and, because of petitioner's line of business, stood to reap substantial economic benefits from making it difficult for respondent to compete.[11]

Thus in this case the context and nature of petitioner's efforts to influence the Code persuade us that the validity of those efforts must, despite their political impact, be evaluated under the standards of conduct set forth by the antitrust laws that govern the private standard-setting process. The antitrust validity of these efforts is not established, without more, by petitioner's literal compliance with the rules of the Association, for the hope of procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition. An association cannot validate the anticompetitive activities of its members simply by adopting rules that fail to provide such safeguards.[12] The issue of immunity in this case thus collapses into the issue of antitrust liability. Although we do not here set forth the rules of antitrust liability governing the private standard-setting process, we hold that at least where, as here, an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.

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[11] Although the absence of such anticompetitive motives and incentives is relevant to determining whether petitioner's restraint of trade is protected under *Claiborne Hardware*, we do not suggest that the absence of anticompetitive purpose is necessary for *Noerr* immunity. As the dissent points out, in *Noerr* itself the major purpose of the activity at issue was anticompetitive. *Post*, at 512–513. Our statement that the "ultimate aim" of petitioner "is not dispositive," *supra*, at 504, stands only for the proposition that, at least outside the political context, the mere fact that an anticompetitive activity is also intended to influence governmental action is not alone *sufficient* to render that activity immune from antitrust liability.

[12] Even petitioner's counsel concedes, for example, that *Noerr* would not apply if the Association had a rule giving the steel conduit manufacturers a veto over changes in the Code. Tr. of Oral Arg. 41–42.

This conclusion does not deprive state and local governments of input and information from interested individuals or organizations or leave petitioner without ample means to petition those governments. Cf. *Noerr,* 365 U. S., at 137–138. See also *California Motor Transport,* 404 U. S., at 510. Petitioner, and others concerned about the safety or competitive threat of polyvinyl chloride conduit, can, with full antitrust immunity, engage in concerted efforts to influence those governments through direct lobbying, publicity campaigns, and other traditional avenues of political expression. To the extent state and local governments are more difficult to persuade through these other avenues, that no doubt reflects their preference for and confidence in the nonpartisan consensus process that petitioner has undermined. Petitioner remains free to take advantage of the forum provided by the standard-setting process by presenting and vigorously arguing accurate scientific evidence before a nonpartisan private standard-setting body.[13] And petitioner can avoid the strictures of the private standard-setting process by attempting to influence legislatures through other forums.

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[13] The dissent mistakenly asserts that we today hold that *Noerr* immunity does not apply to mere efforts to persuade others to exclude a competitor's product from a private code. See *post,* at 514–516. Our holding is expressly limited to cases where an "economically interested party exercises *decisionmaking* authority in formulating a product standard for a private association that comprises market participants." *Supra,* at 509 (emphasis added); see also *supra,* at 506–507 (relying in part on the distinction between activity involving the exercise of decisionmaking authority and market power and activity involving mere attempts to persuade an independent decisionmaker). Cf. *Noerr,* 365 U. S., at 136. The dissent also mistakenly asserts that this description encompasses all private standard-setting associations. See *post,* at 515. In fact, many such associations are composed of members with expertise but no economic interest in suppressing competition. See, *e. g.*, *Sessions, supra,* at 461, and n. 2.

What petitioner may not do (without exposing itself to possible antitrust liability for direct injuries) is bias the process by, as in this case, stacking the private standard-setting body with decisionmakers sharing their economic interest in restraining competition.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961), held that the Sherman Act should not be construed to forbid joint efforts by railway companies seeking legislation that would disadvantage the trucking industry. These efforts for the most part involved a public relations campaign rather than direct lobbying of the lawmakers and were held not subject to antitrust challenge because of the fundamental importance of maintaining the free flow of information to the government and the right of the people to seek legislative relief, directly or indirectly. *Mine Workers* v. *Pennington*, 381 U. S. 657 (1965), and *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508 (1972), applied the rule to efforts to seek executive action and to administrative and adjudicative proceedings.

The Court now refuses to apply the rule of these cases to the participants in those private organizations, such as the National Fire Protection Association (NFPA), that regularly propound and publish health and safety standards for a variety of products and industries and then present these codes to state and local authorities for the purpose of having them enacted into law. The NFPA and those participating in the code-writing process will now be subject to antitrust liability if their efforts have anticompetitive effects and do not withstand scrutiny under the rule of reason. Believing that this result is a misapplication of the *Noerr* decision and an improvident construction of the Sherman Act, I respectfully dissent..

This case presents an even stronger argument for immunity than did *Noerr* itself. That decision turned on whether the design or purpose of the conduct was to obtain or influence the passage or enforcement of laws. The Court concedes that petitioner's actions in this case constituted a "genuine effort to influence governmental action," *ante*, at 503, and that this was its "ultimate aim," *ante*, at 504. In *Noerr*, the publicity campaign was dispersed widely among the public in a broad but necessary diluted attempt to move public opinion in hopes that government officials would take note and respond accordingly. The campaign apparently had some influence on the passage of tax laws and other legislation favorable to the railroads in New Jersey, New York, and Ohio, and procured the Governor's veto of a bill that had been passed in Pennsylvania. See 365 U. S., at 130; see also 155 F. Supp. 768, 777–801 (ED Pa. 1957). Here, the NFPA actually drafted proposed legislation in the form of the National Electrical Code (NEC) and presented it countrywide. Not only were petitioner's efforts in this case designed to influence the passage of state laws, but there was also a much greater likelihood that they would be successful than was the case in *Noerr*. This is germane because it establishes a much greater likelihood that the "purpose" and "design" of petitioner's actions in this case was the "solicitation of governmental action with respect to the passage and enforcement of laws," 365 U. S., at 138.

Rather than directly confronting the severe damage that today's decision does to the *Noerr* doctrine, the majority asserts that the "ultimate aim" of petitioner's efforts "is not dispositive." *Ante*, at 504. That statement cannot be reconciled with the statements quoted earlier from *Noerr*, where it was held that even if one of the major purposes, or even the *sole* purpose, of the publicity campaign was "to destroy the truckers as competitors," 365 U. S., at 138, those actions were immunized from antitrust liability because ultimately they were "directed toward obtaining governmental action," *id.*, at 140. The majority later doubles back on this statement, and suggests that it is important in this case that "petitioner was at least partially motivated by the desire to lessen competition, and . . . stood to reap substantial economic benefits from making it difficult for respondent to compete." *Ante*, at 509. It need hardly be said that all of this was also true in *Noerr*. Nobody condones fraud, bribery, or misrepresentation in any form, and other state and federal laws ensure that such conduct is punishable. But the point here is that conduct otherwise punishable under the antitrust laws either becomes immune from the operation of those laws when it is part of a larger design to influence the passage and enforcement of laws, or it does not. No workable boundaries to the *Noerr* doctrine are established by declaring, and then repeating at every turn, that everything depends on "the context and nature of" the activity, *ante*, at 504, 505, 506, 509, if we are unable to offer any further guidance about what this vague reference is supposed to mean, especially when the result here is so clearly wrong as long as *Noerr* itself is reputed to remain good law. One unfortunate consequence of today's decision, therefore, is that district courts and courts of appeals will be obliged to puzzle over claims raised under the doctrine without any intelligible guidance about when and why to apply it.

If there were no private code-writing organizations, and state legislatures themselves held the necessary hearing and wrote codes from scratch, then business concerns like Allied, together with their friends, could jointly testify with impunity about the safety of various products, even though they had anticompetitive motives in doing so. This much the majority concedes, as it does that the major purpose of the code-writing organizations is to influence legislative action. These days it is almost a foregone conclusion that the vast majority of the States will adopt these codes with little or no change. It is untenable to consider the code-writing process by such organizations as the NFPA as too far removed from the legislative process to warrant application of the doctrine announced in *Noerr* and faithfully applied in other cases. This was the view of Judge Sneed and his colleagues on the Ninth Circuit in *Sessions Tank Liners, Inc.* v. *Joor Mfg., Inc.*, 827 F. 2d 458 (1987), and the reasons they gave for applying *Noerr* in this context are much more persuasive than anything to the contrary the majority now has to offer.

The Court's decision is unfortunate for another reason. There are now over 400 private organizations preparing and publishing an enormous variety of codes and standards. State and local governments necessarily, and as a matter of course, turn to these proposed codes in the process of legislating to further the health and safety of their citizens. The code that is at issue in this case, for example, was adopted verbatim by 25 States and the District of Columbia; 19 others adopted it with only minor changes. It is the most widely disseminated and adopted model code in the world today. There is no doubt that the work of these private organizations contributes enormously to the public interest and that participation in their work by those who have the technical competence and experience to do so should not be discouraged.

The Court's decision today will surely do just that. It must inevitably be the case that codes such as the NEC will set standards that some products cannot satisfy and hence in the name of health and safety will reduce or prevent competition, as was the case here. Yet, putative competitors of the producer of such products will now think twice before urging in the course of the code-making process that those products not be approved; for if they are successful (or even if they are not), they may well become antitrust defendants facing treble-damages liability unless they can prove to a court and a jury that they had no evil motives but were merely "presenting and vigorously arguing accurate scientific evidence before a nonpartisan private standard-setting body," *ante*, at 510 (though with the knowing and inevitable result of eliminating competition). In this case, for example, even if Allied had not resorted to the tactics it employed, but had done no more than successfully argue in good faith the hazards of using respondent's products, it would have inflicted the same damage on respondent and would have risked facing the same antitrust suit, with a jury ultimately deciding the health and safety implications of the products at issue.

The Court's suggestion that its decision will not affect the ability of these organizations to assist state and local governments is surely wrong. The Court's holding is "that at least where, as here, an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effects the standard has of its own force in the marketplace." *Ante*, at 509–510. This description encompasses the structure and work of all such organizations as we now know them. The Court is saying, in effect, that where a private organization sets standards, the participants can be sued under the antitrust laws for *any* effects those standards have in the marketplace *other than* those flowing from their adoption into law. But the standards will have *some* effect in the marketplace even where they are also adopted into law, through publicity and other means, thus exposing the participants to liability. Henceforth, therefore, any private organization offers such standards at its peril, and without any of the breathing room enjoyed by other participants in the political process.

The alternative apparently envisioned by the Court is that an organization can gain the protection of the *Noerr* doctrine as long as nobody with any economic interest in the product is permitted to "exercis[e] decisionmaking authority" (*i. e.*, vote) on its recommendations as to particular product standards. Insisting that organizations like the NFPA conduct themselves like courts of law will have perverse effects. Legislatures are willing to rely on such organizations precisely because their standards are being set by those who possess an expert understanding of the products and their uses, which are primarily if not entirely those who design, manufacture, sell, and distribute them. Sanitizing such bodies by discouraging the active participation of those with economic interests in the subject matter undermines their utility.

I fear that exposing organizations like the NFPA to antitrust liability will impair their usefulness by inhibiting frank and open discussion of the health and safety characteristics of new or old products that will be affected by their codes. The Court focuses on the tactics of petitioner that are thought to have subverted the entire process. But it is not suggested that if there are abuses, they are anything more than occasional happenings. The Court does speculate about the terrible practices that applying *Noerr* in this context could lead us to condone in future cases, *ante*, at 503–504, but these are no more than fantasies, since nothing of the sort occurred in the wake of *Noerr* itself. It seems to me that today's decision is therefore an unfortunate case of overkill.

Of course, the *Noerr* immunity is not unlimited and by its terms is unavailable where the alleged efforts to influence legislation are nothing but a sham. As the Ninth Circuit held, this limitation is enough to guard against flagrant abuse. In any event, occasional abuse is insufficient ground to render the entire process less useful and reliable. I would reverse the judgment below and remand for further proceedings.

VAN CAUWENBERGHE *v.* BIARD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-336. Argued March 21, 1988—Decided June 13, 1988

The courts of appeals have jurisdiction under 28 U. S. C. § 1291 of appeals "from all final decisions of the district courts." Under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, and *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, a "collateral order" which does not actually end the district court litigation is nevertheless considered to be final and immediately appealable under § 1291 if, *inter alia*, it resolves an important issue completely separate from the merits of the action and is effectively unreviewable on appeal from a final judgment. Petitioner, a resident of Belgium, was indicted in the Central District of California for fraudulently inducing respondent to lend money to a California real estate partnership engaged in renovating a Kansas City townhouse complex. While on a trip to Switzerland, petitioner was arrested under the applicable extradition treaty and extradited to Los Angeles. One week before his criminal trial commenced, respondent filed a civil suit against petitioner in the same District, asserting various claims arising out of the defaulted loan. About two weeks after his sentencing following his conviction on the criminal charges, petitioner was served with the civil summons and complaint. The District Court summarily denied petitioner's motions to dismiss, which were based upon the argument that petitioner was immune from civil process because his presence in the United States resulted from extradition, and upon *forum non conveniens* grounds. The Court of Appeals dismissed petitioner's appeal for lack of jurisdiction, citing *Cohen*, *supra*, and *Mitchell* v. *Forsyth*, 472 U. S. 511.

Held: Neither an order denying a motion to dismiss on the ground that an extradited person is immune from civil process, nor an order denying such a motion on *forum non conveniens* grounds, is a collateral order subject to immediate appeal as a final judgment under § 1291. Pp. 521-530.

(a) Assuming, without deciding, that the "principle of specialty," see *United States* v. *Rauscher*, 119 U. S. 407, immunizes petitioner from civil service of process while his presence in this country is compelled by extradition, petitioner's claim is nevertheless effectively reviewable on appeal from final judgment, and thus is not immediately appealable under the collateral order doctrine. Unlike the qualified immunity claim considered in *Mitchell, supra,* the "essence" of petitioner's claim of immunity under the principle of specialty is not a right not to stand trial, which would be irretrievably lost absent an immediate appeal. The principle of specialty operates to ensure that the receiving state does not abuse the extraditing state's extradition processes, and the conduct of a civil trial does not significantly implicate the reviewing state's obligation in that regard, since the state does not bring its coercive power to bear in such circumstances but simply provides a forum for the resolution of a private dispute. Moreover, the defense of a civil suit does not significantly restrict a defendant's liberty, since he cannot be subjected to pretrial detention or required to post bail, and is not even compelled to be present at trial. Furthermore, a right not to stand trial is not entailed in the mere assertion that the district court lacks personal jurisdiction because of immunity from service of process. The right involved in this challenge must be characterized as the right not to be subject to a binding judgment, which may be effectively vindicated following final judgment. Pp. 522–527.

(b) The order denying the motion to dismiss on *forum non conveniens* grounds does not fall within the collateral order doctrine, since the convenience-of-the-forum question is not completely separate from the merits of the action. Although the determination of that question may not require significant inquiry into the facts and legal issues in some cases, in the main, a district court ruling on such a motion will generally become entangled in the merits of the case in assessing such questions as the relative ease of access to the sources of proof, the availability of witnesses, and the actual locus of the alleged culpable conduct. Thus, such determinations are unsuited for immediate appeal as of right under § 1291. This conclusion is fortified by the availability of interlocutory review under 28 U. S. C. § 1292(b) of *forum non conveniens* determinations in appropriate cases. Pp. 527–530.

Affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

John G. Kester argued the cause and filed briefs for petitioner.

Thomas C. Walsh argued the cause for respondent. With him on the brief were *Michael G. Biggers* and *Percy Anderson.*

JUSTICE MARSHALL delivered the opinion of the Court.

This case requires us to determine whether two types of orders by a district court are immediately appealable under

28 U. S. C. § 1291: first, an order denying a motion to dismiss based on an extradited person's claim that he is immune from civil service of process; and second, an order denying a motion to dismiss on the ground of *forum non conveniens.*

I

This case arises from a dispute over a loan. Petitioner, a real estate broker in Brussels, encouraged respondent, also a Brussels resident, to meet with one Alan Blair in the United States to discuss a real estate investment. Blair is a resident of Los Angeles. Following a business trip to Atlanta, respondent traveled to Los Angeles where he met petitioner, Blair, and others, to talk about the investment. Blair described a real estate partnership called Three B Investment Associates, which was renovating a townhouse complex outside Kansas City known as Concorde Bridge Townhouses. At petitioner's urging, respondent agreed to lend the partnership $1 million for three years at 20% per annum interest, secured by a mortgage on the Concorde Bridge complex. At the time, the partnership did not have title to the Concorde Bridge complex, but it held a contract to purchase the complex and had made a substantial deposit.

The partnership, after making some scheduled payments, eventually defaulted on its promissory note to respondent. The mortgage proved worthless because the partnership had not acquired title to the Concorde Bridge complex. Respondent retained American counsel, claiming that he had been misled into believing that the partnership held title to the Concorde Bridge Townhouses at the time of the loan. Soon thereafter, United States prosecutors became involved in the controversy. In October 1984, petitioner, Blair, and another American were indicted in the Central District of California on charges of wire fraud and causing the interstate transportation of a victim of fraud. The indictment charged that the three defendants had fraudulently induced respondent to lend them $1 million by falsely representing that they owned the Concorde Bridge complex through the real estate partnership.

While on a trip to Geneva, petitioner was arrested pursuant to a request from the United States Department of Justice under the applicable extradition treaty with Switzerland. See Treaty between the United States and Switzerland for the Extradition of Criminals, May 14, 1900, 31 Stat. 1928, T. S. No. 354 (1900). Petitioner was extradited and delivered to Los Angeles by United States Marshals after legal proceedings in Swiss courts. Following a jury trial, petitioner was found guilty on one count of wire fraud and one count of causing the interstate transportation of a victim of fraud. On January 22, 1986, petitioner was sentenced to a prison term of one year and one day, which was satisfied by the time he already had spent in pretrial confinement. The trial court also ordered petitioner to pay respondent restitution of $34,501.26 and placed him on probation. Petitioner was ordered not to leave the United States until the restitution order was satisfied.[1] The conviction was affirmed by the Court of Appeals. *United States* v. *Van Cauwenberghe*, 827 F. 2d 424 (CA9 1987), cert. denied, 484 U. S. 1042 (1988).

On November 12, 1985, one week before petitioner's criminal trial commenced, respondent filed a civil suit against petitioner, Blair, and others in the District Court for the Central District of California. The complaint asserted a civil Racketeer Influenced and Corrupt Organizations (RICO) claim, a common-law claim of fraud, and other pendent state-law claims arising out of the defaulted loan. On February 5, 1986, about two weeks after his sentencing, petitioner was served with the summons and complaint as he was arriving at the office of his probation officer to keep a scheduled appointment. Petitioner moved to dismiss the suit on two separate grounds. First, he argued that because his presence in the

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[1] Petitioner's probation order has since been modified and he has returned to Belgium after having provided security for the payment of the restitution.

United States was a result of extradition, he was immune from civil process. Second, petitioner argued that the complaint should be dismissed on the ground of *forum non conveniens*. The District Court summarily denied both motions. App. 221, *Biard* v. *Blair*, No. CV 85–7378 JSL (Nov. 17, 1986). The Court of Appeals dismissed petitioner's appeal for lack of jurisdiction in a one-line order, citing this Court's decisions in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), and *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985). App. 234, No. 86–6735 (CA9, July 7, 1987).[2] We granted certiorari, 484 U. S. 942 (1987), and we now affirm.

II

The courts of appeals have jurisdiction under 28 U. S. C. § 1291 of appeals "from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court." A party generally may not take an appeal under § 1291 until there has been a decision by the district court that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[3] *Catlin*

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[2] Although petitioner did not make a general appearance, the District Court proceeded with the case after the appeal was filed with the Court of Appeals. The District Court granted respondent's motion for summary judgment and entered judgment for respondent on the RICO claim for treble damages of $1.8 million, plus attorney's fees of $75,000. *Biard* v. *Blair*, No. CV 85–7378 JSL (JRx) (Apr. 6, 1987), App. to Brief for Respondents, A–3.

[3] The purposes behind the rule that a party must ordinarily raise all claims of error in a single appeal following final judgment are by now well known:

"[The rule] emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of 'avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a

v. *United States*, 324 U. S. 229, 233 (1945). In *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, however, we recognized a "small class" of decisions that are immediately appealable under § 1291 even though the decision has not terminated the proceedings in the district court. 337 U. S., at 546. The Court stated that a decision is final and appealable for purposes of § 1291 if it "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Ibid.* The Court refined the "collateral order" doctrine of *Cohen* in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463 (1978). In *Coopers & Lybrand*, the Court held that to come within the collateral order doctrine of *Cohen*, the order must satisfy each of three conditions: it must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." 437 U. S., at 468 (footnote omitted).

As petitioner acknowledges, the order of the District Court denying petitioner's motion to dismiss on grounds of immunity from civil process or *forum non conveniens* did not end the litigation on the merits. Therefore, the order is appealable as to either ground only if the three requirements set out in *Coopers & Lybrand* are met.

A

In asserting the appealability of his claim of immunity from civil process, petitioner principally relies on this Court's decision in *Mitchell* v. *Forsyth*, *supra*. The Court held in *Mitchell* that the denial of a claim of qualified immunity by the Attorney General was immediately appealable under the

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litigation may give rise, from its initiation to entry of judgment.'" *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368, 374 (1981), quoting *Cobbledick* v. *United States*, 309 U. S. 323, 325 (1940).

collateral order doctrine. The crucial issue in *Mitchell* was whether the order was effectively unreviewable on appeal from final judgment. See *id.*, at 525. In holding that such an order was effectively unreviewable, the Court reasoned that an "essential attribute" of qualified immunity is "an entitlement not to stand trial under certain circumstances," and thus is "an *immunity from suit* rather than a mere defense to liability." *Id.*, at 525, 526. As with absolute immunity, the Court concluded, "[the entitlement] is effectively lost if a case is erroneously permitted to go to trial." *Id.*, at 526.

Petitioner argues that under *United States* v. *Rauscher*, 119 U. S. 407 (1886), as well as under federal extradition statutes and the extradition treaty between the United States and Switzerland, he is immune from civil service of process while his presence in the United States is compelled by extradition for criminal charges. Petitioner further contends that his immunity under *Rauscher*, like the immunity in *Mitchell*, entails the right not to stand trial, which cannot be effectively vindicated on appeal from final judgment. In *Rauscher*, the Court stated the general "principle of specialty" in federal extradition law:

> "[A] person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings." 119 U. S., at 430.

Petitioner argues that the principle of specialty requires not merely that an extradited person be immune from criminal prosecutions other than the offenses for which he was extradited, but that he be generally "free from any judicial interference," including civil suit. Brief for Petitioner 18.

The issue on which we granted certiorari, however, and on which the Court of Appeals based its decision, is not whether petitioner's underlying claim of immunity is meritorious, but whether the denial of petitioner's motion to dismiss on grounds of immunity from service of process is immediately appealable. For purposes of determining appealability, therefore, we will assume, but do not decide, that petitioner has presented a substantial claim of immunity from civil service of process that warrants appellate consideration. Making this assumption, we conclude that petitioner's claim of immunity from service is effectively reviewable on appeal from final judgment, and thus is not an immediately appealable collateral order under *Cohen* and *Coopers & Lybrand.*

The critical question, following *Mitchell,* is whether "the essence" of the claimed right is a right not to stand trial. *Mitchell,* 472 U. S., at 525. This question is difficult because in some sense, all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial. But the final-judgment rule requires that except in certain narrow circumstances in which the right would be "irretrievably lost" absent an immediate appeal, *Richardson-Merrell Inc.* v. *Koller,* 472 U. S. 424, 431 (1985), litigants must abide by the district court's judgments, and suffer the concomitant burden of a trial, until the end of proceedings before gaining appellate review. As the Court stated in *United States* v. *MacDonald,* 435 U. S. 850, 860, n. 7 (1978):

> "Admittedly, there is value—to all but the most unusual litigant—in triumphing before trial, rather than after it, regardless of the substance of the winning claim. But this truism is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial."

Because of the important interests furthered by the final-judgment rule, see n. 3, *supra,* and the ease with which certain pretrial claims for dismissal may be alleged to entail the right not to stand trial, we should examine the nature of the right asserted with special care to determine whether an essential aspect of the claim is the right to be free of the burdens of a trial.

We believe that even if the principle of specialty shields petitioner from service of process in a civil suit while he is detained in the United States following his extradition and conviction—an issue on which we express no opinion—the right not to be burdened with a civil trial itself is not an essential aspect of this protection. First, the principle of specialty fundamentally bears on treaty obligations between states; the principle operates to ensure that the receiving state does not abuse the extradition processes of the extraditing state. See *Rauscher, supra,* at 419–420; 1 M. Bassiouni, International Extradition: United States Law and Practice, ch. 7, § 7, pp. 360–361 (2d ed. 1987). The conduct of a civil trial, prior to any attempt to subject the defendant to a binding judgment of the court, does not significantly implicate the receiving state's obligation under the doctrine. Unlike a criminal prosecution, in which the coercive power of the state is immediately brought to bear, the state's involvement in the conduct of a private civil suit is minimal. The state's role is simply to provide a forum for the resolution of a private dispute. In the absence of an explicit agreement obligating the United States to protect the extradited person from the burdens of a civil suit, we believe that there is little potential that the extraditing state, in this case Switzerland, will view the mere conduct of a private civil trial as a breach of an obligation by the United States not to abuse the extradition process.[4]

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[4] Petitioner does not dispute that neither the extradition treaty with Switzerland, Treaty between the United States and Switzerland for the Extradition of Criminals, May 14, 1900, 31 Stat. 1928, T. S. No. 354 (1900), nor the relevant federal statutes governing extradition matters, see 18 U. S. C. §§ 3186, 3192, deal explicitly with the protection of an extradited person from civil suit.

In addition, to the extent that the principle of specialty protects an extradited person from the exercise of coercive power by the receiving state on matters not anticipated by the extradition, the defense of a civil suit does not significantly restrict a defendant's liberty. Service of process merely requires that a defendant appear through an attorney and file an answer to the complaint to avoid default. There is no possibility that the defendant will be subject to pretrial detention or be required to post bail. The defendant is not even compelled to be present at trial. We therefore conclude that a right not to stand trial in a civil suit is not an essential aspect of a claim of immunity under the principle of specialty.

Given that the principle of specialty provides no independent support for petitioner's claim that he has a right not to stand trial, the question becomes whether such a right is entailed in the mere assertion that the district court lacks personal jurisdiction because of immunity from service of process. Cf. *Rauscher*, 119 U. S., at 433 ("[Court] did not have jurisdiction of the person at that time").[5] In the context of due process restrictions on the exercise of personal jurisdiction, this Court has recognized that the individual interest protected is in "not being subject to the binding judgments of a forum with which [the defendant] has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462, 471–472 (1985), quoting *International Shoe Co.* v. *Washington*, 326 U. S. 310, 319 (1945). Similarly, we believe petitioner's challenge to the District Court's exercise of personal jurisdiction because he is immune from civil process should be characterized as the right not to be subject to a binding judgment of the court. Because the right not to be subject to a binding judgment may be effectively vindicated following final judgment, we have held that the denial of a claim of lack of jurisdiction is not an immediately appealable collateral order. See *Catlin* v. *United States*, 324 U. S., at 236. The Court of Appeals was therefore correct to conclude that the District Court's denial of petitioner's motion to dismiss on the ground of immunity from civil process is not immediately appealable.

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[5] As petitioner acknowledges, if he had been properly served in Belgium or Switzerland prior to his extradition, or had been served while in the United States on other business, then he could rightly have been compelled to defend respondent's civil suit. Petitioner thus does not contend that he never can be haled into court on the same complaint in the same forum, but argues that he is immune from service of process at this time and in this manner, "by taking advantage of an extraditee's forced presence in this country." See Reply Brief for Petitioner 5.

B

Petitioner also argues that the District Court's order denying the motion to dismiss on the ground of *forum non conveniens* falls within the collateral order doctrine of *Cohen* and thus is immediately appealable under § 1291. We conclude, however, as have the majority of the Courts of Appeals that have considered the issue,[6] that the question of the convenience of the forum is not "completely separate from the merits of the action," *Coopers & Lybrand*, 437 U. S., at 468, and thus is not immediately appealable as of right.

The requirement that the order be completely separate from the merits is "a distillation of the principle that there should not be piecemeal review of 'steps towards final judgment in which they will merge.'" *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 12, n. 13 (1983), quoting *Cohen*, 337 U. S., at 546. Allowing appeals from interlocutory orders that involve considerations enmeshed in the merits of the dispute would waste judicial resources by requiring repetitive appellate review of substantive questions in the case. In *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 508 (1947), the Court described various "[i]mportant considerations" for district courts to balance in deciding whether a particular forum is so inconvenient for the defendant as to warrant dismissal. We believe these considerations make clear that in assessing a *forum non conveniens* motion, the district court generally becomes entangled in the merits of the underlying dispute.

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[6] See *Carlenstolpe* v. *Merck & Co.*, 819 F. 2d 33, 36 (CA2 1987) ("[T]he determining factors in a forum non conveniens motion are 'enmeshed' in the underlying cause of action"); *Partrederiet Treasure Saga* v. *Joy Manufacturing Co.*, 804 F. 2d 308, 310 (CA5 1986) (same); *Rosenstein* v. *Merrell Dow Pharmaceuticals*, 769 F. 2d 352, 354 (CA6 1985) (same); *Coastal Steel Corp.* v. *Tilghman Wheelabrator Ltd.*, 709 F. 2d 190, 195 (CA3 1983) (same). Only one Circuit has held that the denial of a motion to dismiss on the ground of *forum non conveniens* is immediately appealable under 28 U. S. C. § 1291. See *Hodson* v. *A. H. Robins Co.*, 715 F. 2d 142, 145, n. 2 (CA4 1983).

The Court in *Gulf Oil* stated that district courts must look into "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling . . . witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Ibid.* To examine "the relative ease of access to sources of proof," and the availability of witnesses, the district court must scrutinize the substance of the dispute between the parties to evaluate what proof is required, and determine whether the pieces of evidence cited by the parties are critical, or even relevant, to the plaintiff's cause of action and to any potential defenses to the action. Public interest factors relevant to a *forum non conveniens* determination—such as the "local interest in having localized controversies decided at home" and the interest in having "the trial of a diversity case in a forum that is at home with the state law that must govern the case," *id.*, at 509—also thrust the court into the merits of the underlying dispute. To evaluate these factors, the court must consider the locus of the alleged culpable conduct, often a disputed issue, and the connection of that conduct to the plaintiff's chosen forum. Cf. *Piper Aircraft Co.* v. *Reyno*, 454 U. S. 235, 259–260 (1981).

This list of considerations to be balanced is by no means exhaustive, and some factors may not be relevant in the context of a particular case. Moreover, the district court's inquiry does not necessarily require extensive investigation, and may be resolved on affidavits presented by the parties. See *id.*, at 258–259. As we previously have recognized, the district court is accorded substantial flexibility in evaluating a *forum non conveniens* motion, *id.*, at 249, and "[e]ach case turns on its facts." *Williams* v. *Green Bay & Western R. Co.*, 326 U. S. 549, 557 (1946). It is thus undoubtedly true that in certain cases, the *forum non conveniens* determination will not require significant inquiry into the facts and legal issues presented by a case, and an immediate appeal might result in substantial savings of time and expense for both the litigants and the courts. In fashioning a rule of appealability under § 1291, however, we look to categories of cases, not to particular injustices. See *Carroll* v. *United States*, 354 U. S. 394, 405 (1957) ("Appeal rights cannot depend on the facts of a particular case"); *United States* v. *MacDonald*, 435 U. S., at 857–858, n. 6.[7] We believe that in the main, the issues that arise in *forum non conveniens* determinations will substantially overlap factual and legal issues of the underlying dispute, making such determinations unsuited for immediate appeal as of right under § 1291.

Our conclusion that the denial of a motion to dismiss on the ground of *forum non conveniens* is not appealable under § 1291 is fortified by the availability of interlocutory review pursuant to 28 U. S.C § 1292(b). Under § 1292(b), a district court may certify a nonfinal order for interlocutory review when the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation." A court of appeals may then, in its discretion, determine whether the order warrants prompt review. See *Coopers & Lybrand*, 437 U. S., at 474–475. Section 1292(b) therefore provides an avenue for review of *forum non conveniens* determinations in appropriate cases.

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[7] Petitioner argues that the *forum non conveniens* determination in this case is especially worthy of immediate review because the District Court disposed of the motion summarily instead of making factual findings and articulating reasons for its decision. Petitioner essentially claims that the District Court's failure to explain its determination in this case is a clear abuse of discretion, and such clear errors should be promptly appealable. For the reasons stated in the text, we refuse to fashion an exception from the general rule of nonappealibility for what petitioner describes as "facially apparent reversible error," Brief for Petitioner 35. Cf. *United States* v. *MacDonald*, 435 U. S., at 857–858, n. 6; *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 476 (1978).

III

We hold that neither an order denying a motion to dismiss on grounds that an extradited person is immune from civil process, nor an order denying a motion to dismiss on the ground of *forum non conveniens*, is a collateral order subject to appeal as a final judgment under 28 U. S. C. § 1291. The Court of Appeals therefore lacked jurisdiction to consider petitioner's appeal. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

BERKOVITZ ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 87–498. Argued April 19, 1988—Decided June 13, 1988

A provision of the Federal Tort Claims Act (FTCA) excepts from statutory liability any claim "based upon [a federal agency's or employee's] exercise or performance or the failure to exercise or perform a discretionary function or duty." Upon contracting a severe case of polio after ingesting a dose of Orimune, an oral polio vaccine manufactured by Lederle Laboratories, petitioner Kevan Berkovitz, a minor, joined by his parents (also petitioners) as guardians, filed an FTCA suit alleging violations of federal law and policy by the National Institutes of Health's Division of Biologic Standards (DBS) in licensing Lederle to produce Orimune, and by the Bureau of Biologics of the Food and Drug Administration (FDA) in approving the release to the public of the particular lot of vaccine containing Berkovitz's dose. The District Court denied the Government's motion to dismiss the suit for lack of subject-matter jurisdiction, but the Court of Appeals reversed. Although rejecting the Government's argument that the discretionary function exception bars all claims arising out of federal agencies' regulatory activities, the court held that the licensing and release of polio vaccines are wholly discretionary actions protected by the exception.

Held:

1. The language, purpose, and legislative history of the discretionary function exception, as well as its interpretation in this Court's decisions, establish that the exception does not preclude liability for any and all acts arising out of federal agencies' regulatory programs, but insulates from liability only those governmental actions and decisions that involve an element of judgment or choice and that are based on public policy considerations. Pp. 535–539.

2. The Court of Appeals erred in holding that the discretionary function exception bars petitioners' claims. Pp. 539–548.

(a) Statutory and regulatory provisions require the DBS, prior to issuing a license for a product such as Orimune, to receive all data which the manufacturer is required to submit, to examine the product, and to make a determination that it complies with safety standards. Thus, a cause of action based on petitioner's allegation that the DBS licensed Orimune without first receiving the required safety data is not barred by the discretionary function exception, since the DBS has no discretion to issue a license under such circumstances, and doing so would violate a specific statutory and regulatory directive. Petitioners' other claim—that the DBS licensed Orimune even though the vaccine did not comply with certain regulatory safety standards—if interpreted to mean that the DBS issued the license without determining compliance with the standards or after determining a failure to comply, also is not barred by the discretionary function exception, since the claim charges the agency with failing to act in accordance with specific mandatory directives, as to which the DBS has no discretion. However, if this claim is interpreted to mean that the DBS made an incorrect compliance determination, the question of the discretionary function exception's applicability turns on whether the DBS officials making that determination permissibly exercise policy choice, a point that is not clear from the record and therefore must be decided by the District Court if petitioners choose to press this interpretation. Pp. 540–545.

(b) Although the regulatory scheme governing the public release of vaccine lots allows the FDA to determine the appropriate manner in which to regulate, petitioners have alleged that, under the authority granted by the regulations, the FDA has adopted a policy of testing all lots for compliance with safety standards and of preventing the public distribution of any lot that fails to comply, and that, notwithstanding this mandatory policy, the FDA knowingly approved the release of the unsafe lot in question. Accepting these allegations as true, as is necessary in reviewing a dismissal, the holding that the discretionary function exception barred petitioners' claim was improper, since the acts complained of do not involve the permissible exercise of discretion to release a noncomplying lot on the basis of policy considerations. Pp. 545–548.

822 F. 2d 1322, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

Ellen M. Viakley argued the cause for petitioners. With her on the briefs were *Gary S. Gildin* and *Paul R. Friedman.*

Michael K. Kellogg argued the cause for the United States. With him on the brief were *Solicitor General Fried, Assistant Attorney General Bolton, Deputy Solicitor General Ayer, John F. Cordes, William Cole, Thomas Scarlett,* and *Ann H. Wion.*[*]

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[*] *Lloyd N. Cutler, James Robertson,* and *Ronald J. Greene* filed a brief for Lederle Laboratories as *amicus curiae.*

JUSTICE MARSHALL delivered the opinion of the Court.

The question in this case is whether the discretionary function exception of the Federal Tort Claims Act (FTCA or Act), 28 U. S. C. §2680(a), bars a suit based on the Government's licensing of an oral polio vaccine and on its subsequent approval of the release of a specific lot of that vaccine to the public.

I

On May 10, 1979, Kevan Berkovitz, then a 2-month-old infant, ingested a dose of Orimune, an oral polio vaccine manufactured by Lederle Laboratories. Within one month, he contracted a severe case of polio. The disease left Berkovitz almost completely paralyzed and unable to breathe without the assistance of a respirator. The Communicable Disease Center, an agency of the Federal Government, determined that Berkovitz had contracted polio from the vaccine.

Berkovitz, joined by his parents as guardians, subsequently filed suit against the United States in Federal District Court.[1] The complaint alleged that the United States was liable for his injuries under the FTCA, 28 U. S. C. §§1346(b), 2674, because the Division of Biologic Standards (DBS), then a part of the National Institutes of Health, had acted wrongfully in licensing Lederle Laboratories to produce Orimune and because the Bureau of Biologics of the Food and Drug Administration (FDA) had acted wrongfully in approving release to the public of the particular lot of vaccine containing Berkovitz's dose. According to petitioners, these actions violated federal law and policy regarding the inspection and approval of polio vaccines.

The Government moved to dismiss the suit for lack of subject-matter jurisdiction on the ground that the agency actions fell within the discretionary function exception of the FTCA. The District Court denied this motion, concluding that neither the licensing of Orimune nor the release of a specific lot of that vaccine to the public was a "discretionary function" within the meaning of the FTCA. Civ. Action No. 84–2893 (WD Pa., Apr. 30, 1986). At the Government's request, the District Court certified its decision for immediate appeal to the Third Circuit pursuant to 28 U. S. C. § 1292(b), and the Court of Appeals accepted jurisdiction.

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[1] Petitioners also sued Lederle Laboratories in a separate civil action. That suit was settled before the instant case was filed.

A divided panel of the Court of Appeals reversed. 822 F. 2d 1322 (1987). The court initially rejected the Government's argument that the discretionary function exception bars all claims arising out of the regulatory activities of federal agencies. The court stated that "the discretionary function exception is inapplicable to non-discretionary regulatory actions," *id.*, at 1328, and noted that employees of regulatory agencies have no discretion to violate the command of federal statutes or regulations. Contrary to petitioners' claim, however, the court held that federal law imposed no duties on federal agencies with respect to the licensing of polio virus vaccines or the approval of the distribution of particular vaccine lots to the public. Likening the applicable regulatory scheme to the scheme found to confer discretionary regulatory authority in *United States* v. *Varig Airlines*, 467 U. S. 797 (1984), the court concluded that the licensing and release of polio vaccines were wholly discretionary actions and, as such, could not form the basis for suit against the United States. A dissenting judge argued that the relevant statutes and regulations obligated the DBS to require the submission of test data relating to a vaccine from the manufacturer and to deny a license when the test data showed that the vaccine failed to conform with applicable safety standards. Reading the complaint in this case as alleging a failure on the part of the DBS to act in accordance with these directives, the dissenting judge concluded that the discretionary function exception did not bar petitioners' suit.

We granted certiorari, 484 U. S. 1003 (1988), to resolve a conflict in the Circuits regarding the effect of the discretionary function exception on claims arising from the Government's regulation of polio vaccines. Compare 822 F. 2d 1322, *supra,* with *Baker* v. *United States,* 817 F. 2d 560, 564–566 (CA9 1987) (holding that discretionary function exception did not bar suit alleging a negligent decision to license a polio vaccine); *Loge* v. *United States,* 662 F. 2d 1268, 1272–1273 (CA8 1981) (holding that discretionary function exception did not bar suit alleging negligence in both the licensing of a polio vaccine and the release of a particular vaccine lot). We now reverse the Third Circuit's judgment.

II

The FTCA, 28 U. S. C. § 1346(b), generally authorizes suits against the United States for damages

> "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[2]

The Act includes a number of exceptions to this broad waiver of sovereign immunity. The exception relevant to this case provides that no liability shall lie for

> "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U. S. C. § 2680(a).

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[2] There is currently no dispute in this case as to whether petitioners have stated a claim that falls within this general waiver of immunity. Although the Government raised this issue in its motion to dismiss petitioners' suit, the District Court found that the complaint stated a claim under the relevant state law, and the Government declined to request certification of this decision for immediate appeal.

This exception, as we stated in our most recent opinion on the subject, "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States* v. *Varig Airlines*, 467 U. S., at 808.

The determination of whether the discretionary function exception bars a suit against the Government is guided by several established principles. This Court stated in *Varig* that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Id.*, at 813. In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice. See *Dalehite* v. *United States*, 346 U. S. 15, 34 (1953) (stating that the exception protects "the discretion of the executive or the administrator to act according to one's judgment of the best course"). Thus, the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect. Cf. *Westfall* v. *Erwin*, 484 U. S. 292, 296–297 (1988) (recognizing that conduct that is not the product of independent judgment will be unaffected by threat of liability).

Moreover, assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield. The basis for the discretionary function exception was Congress' desire to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States* v. *Varig Airlines*, *supra*, at 814. The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy. See *Dalehite* v. *United States*, *supra*, at 36 ("Where there is room for policy judgment and decision there is discretion"). In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment.

This Court's decision in *Varig Airlines* illustrates these propositions. The two cases resolved in that decision were tort suits by the victims of airplane accidents who alleged that the Federal Aviation Administration (FAA) had acted negligently in certifying certain airplanes for operation. The Court characterized the suits as challenging the FAA's decision to certify the airplanes without first inspecting them and held that this decision was a discretionary act for which the Government was immune from liability. In reaching this result, the Court carefully reviewed the statutory and regulatory scheme governing the inspection and certification of airplanes. Congress had given the Secretary of Transportation broad authority to establish and implement a program for enforcing compliance with airplane safety standards. In the exercise of that authority, the FAA, as the Secretary's designee, had devised a system of "spot-checking" airplanes for compliance. This Court first held that the establishment of that system was a discretionary function within the meaning of the FTCA because it represented a policy determination as to how best to "accommodat[e] the goal of air transportation safety and the reality of finite agency resources." 467 U. S., at 820. The Court then stated that the discretionary function exception also protected "the acts of FAA employees in executing the 'spot-check' program" because under this program the employees "were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources." *Ibid.* Thus, the Court held the challenged acts protected from liability because they were within the range of choice accorded by federal policy and law and were the results of policy determinations.[3]

In restating and clarifying the scope of the discretionary function exception, we intend specifically to reject the Government's argument, pressed both in this Court and the Court of Appeals, that the exception precludes liability for any and all acts arising out of the regulatory programs of federal agencies. That argument is rebutted first by the language of the exception, which protects "discretionary" functions, rather than "regulatory" functions. The significance of Congress' choice of language is supported by the legislative history. As this Court previously has indicated, the relevant legislative materials demonstrate that the exception was designed to cover not all acts of regulatory agencies and their employees, but only such acts as are "discretionary" in nature.[4] See *Dalehite* v. *United States*, *supra*, at 33–34.

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[3] The decision in *Indian Towing Co.* v. *United States*, 350 U. S. 61 (1955), also illuminates the appropriate scope of the discretionary function exception. The plaintiff in that case sued the Government for failing to maintain a lighthouse in good working order. The Court stated that the initial decision to undertake and maintain lighthouse service was a discretionary judgment. See *id.*, at 69. The Court held, however, that the failure to maintain the lighthouse in good condition subjected the Government to suit under the FTCA. See *ibid.* The latter course of conduct did not involve any permissible exercise of policy judgment.

[4] The House of Representatives Report on the final version of the FTCA discussed the application of the discretionary function exception to the activities of regulatory agencies by stating that it would preclude application of the Act to

> "a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. . . . The bill is not intended to

This coverage accords with Congress' purpose in enacting the exception: to prevent "[j]udicial intervention in . . . the political, social, and economic judgments" of governmental—including regulatory—agencies. *United States* v. *Varig Airlines*, 467 U. S., at 820. Moreover, this Court twice before has rejected a variant of the Government's position. See *Indian Towing Co.* v. *United States*, 350 U. S. 61, 64–65 (1955) (disapproving argument that FTCA precludes liability for the performance of "uniquely governmental functions"); *Rayonier, Inc.* v. *United States*, 352 U. S. 315, 318–319 (1957) (same).[5] And in *Varig*, we ignored the precise argument the Government makes in this case, focusing instead on the particular nature of the regulatory conduct at issue. To the extent we have not already put the Government's argument to rest, we do so now. The discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment. The question in this case is whether the governmental activities challenged by petitioners are of this discretionary nature.

III

Petitioners' suit raises two broad claims. First, petitioners assert that the DBS violated a federal statute and

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authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort. However, the common-law torts of employees of regulatory agencies would be included within the scope of the bill to the same extent as torts of nonregulatory agencies." H. R. Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945).

This passage illustrates that Congress intended the discretionary function exception to apply to the *discretionary* acts of regulators, rather than to all regulatory acts.

[5] The Government's position in this case at times appears to replicate precisely the position expressly rejected in *Indian Towing* and *Rayonier*. See Brief for United States 20 (arguing that Congress intended to preserve immunity for "core governmental function[s]"); *id.*, at 16.

accompanying regulations in issuing a license to Lederle Laboratories to produce Orimune. Second, petitioners argue that the Bureau of Biologics of the FDA violated federal regulations and policy in approving the release of the particular lot of Orimune that contained Kevan Berkovitz's dose. We examine each of these broad claims by reviewing the applicable regulatory scheme and petitioners' specific allegations of agency wrongdoing.[6] Because the decision we review adjudicated a motion to dismiss, we accept all of the factual allegations in petitioners' complaint as true and ask whether, in these circumstances, dismissal of the complaint was appropriate.

A

Under federal law, a manufacturer must receive a product license prior to marketing a brand of live oral polio vaccine. See 58 Stat. 702, as amended, 42 U. S. C. § 262(a). In order to become eligible for such a license, a manufacturer must first make a sample of the vaccine product. See 42 CFR § 73.3 (Supp. 1964); 21 CFR § 601.2 (1987).[7] This process begins with the selection of an original virus strain. The manufacturer grows a seed virus from this strain; the seed virus is then used to produce monopools, portions of which are combined to form the consumer-level product. Federal regulations set forth safety criteria for the original strain, see 42 CFR § 73.110(b)(2) (Supp. 1964); 21 CFR § 630.10(b)(2) (1987), the seed virus, see 42 CFR §§ 73.110(b)(3), (4) (Supp. 1964); 21 CFR §§ 630.10(b)(3), (4) (1987), and the vaccine monopools, see 42 CFR § 73.114 (Supp. 1964); 21 CFR § 630.16 (1987). Under the regulations, the manufacturer must conduct a variety of tests to measure the safety of the product at each stage of the manufacturing process. See 42 CFR §§ 73.110, 73.114 (Supp. 1964); 21 CFR §§ 630.10, 630.16 (1987). Upon completion of the manufacturing process and the required testing, the manufacturer is required to submit an application for a product license to the DBS. See 42 CFR § 73.3 (Supp. 1964); 21 CFR § 601.2 (1987).[8] In addition to this application, the manufacturer must submit data from the tests performed and a sample of the finished product. *Ibid.*

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[6] The parties to this case also have disputed in their briefs and arguments before this Court the applicability of the discretionary function exception to a claim alleging that the DBS wrongfully chose not to revoke Lederle Laboratories' license to manufacture Orimune. Neither the Court of Appeals nor the District Court specifically addressed this issue. Moreover, petitioners did not raise the issue in their petition for a writ of certiorari. We accordingly do not consider or decide the question whether the discretionary function exception bars a claim against the Government for failure to revoke a license to manufacture a polio vaccine.

[7] The DBS issued a license to Lederle Laboratories to produce Orimune in 1963. The first citation in the text is to the regulation in effect at that time. Where the regulation has remained substantially in the same form, a parallel citation is given to the current regulations.

Manufacturers are required to obtain an establishment license in addition to the product license. See 42 CFR §§ 73.2–73.4 (Supp. 1964); 21 CFR 601.1–601.2, 601.10 (1987). Petitioners have not challenged the issuance of an establishment license to Lederle Laboratories.

In deciding whether to issue a license, the DBS is required to comply with certain statutory and regulatory provisions. The Public Health Service Act provides:

> "Licenses for the maintenance of establishments for the propagation or manufacture and preparation of products [including polio vaccines] may be issued only upon a showing that the establishment and the products for which a license is desired meet standards, designed to insure the continued safety, purity, and potency of such products, prescribed in regulations, and licenses for new products may be issued only upon a showing that they

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[8] In 1972, the DBS was transferred from the National Institutes of Health to the FDA and renamed the Bureau of Biologics. See 37 Fed. Reg. 12865 (1972). In 1984, the Bureau of Biologics was renamed the Office of Biologics Research and Review. See 49 Fed. Reg. 23834 (1984). The regulations have been amended accordingly.

> meet such standards. All such licenses shall be issued, suspended, and revoked as prescribed by regulations . . . ." § 351(d), 58 Stat. 702–703, as amended, 42 U. S. C. § 262(d).

A regulation similarly provides that "[a] product license shall be issued only upon examination of the product and upon a determination that the product complies with the standards prescribed in the regulations . . . ." 42 CFR § 73.5(a) (Supp. 1964); see 21 CFR § 601.4 (1987). In addition, a regulation states that "[a]n application for license shall not be considered as filed" until the DBS receives the information and data regarding the product that the manufacturer is required to submit. 42 CFR § 73.3 (Supp. 1964); 21 CFR § 601.2 (1987). These statutory and regulatory provisions require the DBS, prior to issuing a product license, to receive all data the manufacturer is required to submit, to examine the product, and to make a determination that the product complies with safety standards.

Petitioners' first allegation with regard to the licensing of Orimune is that the DBS issued a product license without first receiving data that the manufacturer must submit showing how the product, at the various stages of the manufacturing process, matched up against regulatory safety standards. See App. 12–13; Brief for Petitioners 5–6. The discretionary function exception does not bar a cause of action based on this allegation. The statute and regulations described above require, as a precondition to licensing, that the DBS receive certain test data from the manufacturer relating to the product's compliance with regulatory standards. See § 351(d), 58 Stat. 702–703, as amended, 42 U. S. C. § 262(d) (providing that a license shall issue "only upon a showing" by the manufacturer); 42 CFR § 73.3 (Supp. 1964); 21 CFR § 601.2 (1987) (providing that application for license shall be deemed as filed only upon receipt of relevant test data). The DBS has no discretion to issue a license without first receiving the required test data; to do so would violate a specific statutory and regulatory directive. Accordingly, to the extent that petitioners' licensing claim is based on a decision of the DBS to issue a license without having received the required test data, the discretionary function exception imposes no bar.

Petitioners' other allegation regarding the licensing of Orimune is difficult to describe with precision. Petitioners contend that the DBS licensed Orimune even though the vaccine did not comply with certain regulatory safety standards. See App. 12; Brief for Petitioners 4–6.[9] This charge may be understood in any of three ways. First, petitioners may mean that the DBS licensed Orimune without first making a determination as to whether the vaccine complied with regulatory standards. Second, petitioners may intend to argue that the DBS specifically found that Orimune failed to comply with certain regulatory standards and nonetheless issued a license for the vaccine's manufacture. Third, petitioners may concede that the DBS made a determination of compliance, but allege that this determination was incorrect. Neither petitioners' complaint nor their briefs and argument before this Court make entirely clear their theory of the case.

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[9] Petitioners point to two specific regulatory standards that the product allegedly failed to satisfy. First, petitioners claim that an original virus strain from which the vaccine was made did not comply with the requirement that the strain be "free of harmful effect upon administration in the recommended dosage to at least 100,000 people susceptible to poliomyelitis." 42 CFR § 73.110(b)(2)(i) (Supp. 1964); see 21 CFR § 630.10(b)(2)(i) (1987). Second, petitioners assert that the strain, a seed virus, a vaccine monopool, and the ultimate vaccine product failed to comply with the regulatory scheme's neurovirulence requirement. See 42 CFR §§ 73.110(b)(2)(ii), 73.110(b)(4), 73.114(b)(1) (Supp. 1964); 21 CFR §§ 630.110(b)(2)(ii), 630.110(b)(4), 630.16(b)(1) (1987). Neurovirulence is the capacity of an infectious agent to produce pathologic effects on the central nervous system. In this context, it refers to the vaccine's ability to cause paralytic poliomyelitis. The neurovirulence of a vaccine product is tested by injecting the product into monkeys. The product meets the neurovirulence criterion only if a specified number of the animals survive and a "comparative analysis" demonstrates that the neurovirulence of the vaccine product "does not exceed" the neurovirulence of a reference product previously selected by the agency. 42 CFR § 73.114(b)(1)(iii) (Supp. 1964); 21 CFR § 630.16(b)(1)(iii) (1987).

If petitioners aver that the DBS licensed Orimune either without determining whether the vaccine complied with regulatory standards or after determining that the vaccine failed to comply, the discretionary function exception does not bar the claim. Under the scheme governing the DBS's regulation of polio vaccines, the DBS may not issue a license except upon an examination of the product and a determination that the product complies with all regulatory standards. See 42 CFR § 73.5(a) (Supp. 1964); 21 CFR § 601.4 (1987). The agency has no discretion to deviate from this mandated procedure.[10] Petitioners' claim, if interpreted as alleging that the DBS licensed Orimune in the absence of a determination that the vaccine complied with regulatory standards, therefore does not challenge a discretionary function. Rather, the claim charges a failure on the part of the agency to perform its clear duty under federal law. When a suit charges an agency with failing to act in accord with a specific mandatory directive, the discretionary function exception does not apply.

If petitioners' claim is that the DBS made a determination that Orimune complied with regulatory standards, but that the determination was incorrect, the question of the applicability of the discretionary function exception requires a somewhat different analysis. In that event, the question turns on whether the manner and method of determining compliance with the safety standards at issue involve agency judgment of the kind protected by the discretionary function exception.[11] Petitioners contend that the determination involves the application of objective scientific standards, see Brief for Petitioners 16–17, whereas the Government asserts that the determination incorporates considerable "policy judgment," Brief for United States 36. In making these assertions, the parties have framed the issue appropriately; application of the discretionary function exception to the claim that the determination of compliance was incorrect hinges on whether the agency officials making that determination permissibly exercise policy choice. The parties, however, have not addressed this question in detail, and they have given us no indication of the way in which the DBS interprets and applies the regulations setting forth the criteria for compliance. Given that these regulations are particularly abstruse, we hesitate to decide the question on the scanty record before us. We therefore leave it to the District Court to decide, if petitioners choose to press this claim, whether agency officials appropriately exercise policy judgment in determining that a vaccine product complies with the relevant safety standards.

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[10] Even the Government conceded at oral argument that the DBS has no discretion to issue a product license without an examination of the product and a determination that the product complies with regulatory standards. The transcript reads:

"QUESTION: [Supposing the DBS] did not make any examination of the application at all, or any determination other than some papers have been filed and I will now issue the license.

"Would that comply with the regulation?

"[COUNSEL]: No, it would not comply with the regulation.

"QUESTION: It would violate a mandatory duty . . . , wouldn't it?

"[COUNSEL]: In the extreme instance you are talking about . . . , it would definitely violate that regulation." Tr. of Oral Arg. 34–35.

B

The regulatory scheme governing release of vaccine lots is distinct from that governing the issuance of licenses. The former set of regulations places an obligation on manufacturers to examine all vaccine lots prior to distribution to ensure that they comply with regulatory standards. See 21 CFR

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[11] As noted, see n. 9, *supra*, the regulatory standards that petitioners claim were not satisfied in this case are the neurovirulence criterion and the requirement that virus strains be free from harmful effect. The question presented is thus whether the determination that a vaccine product complies with each of these regulatory standards involves judgment of the kind that the discretionary function exception protects.

§ 610.1 (1978).[12] These regulations, however, do not impose a corresponding duty on the Bureau of Biologics. Although the regulations empower the Bureau to examine any vaccine lot and prevent the distribution of a noncomplying lot, see 21 CFR § 610.2(a) (1978), they do not require the Bureau to take such action in all cases. The regulations generally allow the Bureau to determine the appropriate manner in which to regulate the release of vaccine lots, rather than mandating certain kinds of agency action. The regulatory scheme governing the release of vaccine lots is substantially similar in this respect to the scheme discussed in *United States* v. *Varig Airlines*, 467 U. S. 797 (1984).

Given this regulatory context, the discretionary function exception bars any claims that challenge the Bureau's formulation of policy as to the appropriate way in which to regulate the release of vaccine lots. Cf. *id.*, at 819–820 (holding that discretionary function exception barred claim challenging FAA's decision to establish a spot-checking program). In addition, if the policies and programs formulated by the Bureau allow room for implementing officials to make independent policy judgments, the discretionary function exception protects the acts taken by those officials in the exercise of this discretion. Cf. *id.*, at 820 (holding that discretionary function exception barred claim that employees charged with executing the FAA's spot-checking program made negligent policy judgments respecting the proper inspection of airplanes). The discretionary function exception, however, does not apply if the acts complained of do not involve the permissible exercise of policy discretion. Thus, if the Bureau's policy leaves no room for an official to exercise policy judgment in performing a given act, or if the act simply does not involve the exercise of such judgment, the discretionary function exception does not bar a claim that the act was negligent or wrongful. Cf. *Indian Towing Co.* v. *United States*, 350 U. S., at 69 (holding that a negligent failure to maintain a lighthouse in good working order subjected the Government to suit under the FTCA even though the initial decision to undertake and maintain lighthouse service was a discretionary policy judgment).

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[12] The citation is to the regulation in effect at the time Lederle Laboratories released the lot of Orimune containing Kevan Berkovitz's dose. None of the regulations governing the release of vaccine lots has changed significantly since that time. The current regulations dealing with this subject have the same title and section numbers as the regulations cited in the text.

Viewed in light of these principles, petitioners' claim regarding the release of the vaccine lot from which Kevan Berkovitz received his dose survives the Government's motion to dismiss. Petitioners allege that, under the authority granted by the regulations, the Bureau of Biologics has adopted a policy of testing all vaccine lots for compliance with safety standards and preventing the distribution to the public of any lots that fail to comply. Petitioners further allege that notwithstanding this policy, which allegedly leaves no room for implementing officials to exercise independent policy judgment, employees of the Bureau knowingly approved the release of a lot that did not comply with safety standards. See App. 13; Brief for Petitioners 20–21; Reply Brief for Petitioners 15–17. Thus, petitioners' complaint is directed at a governmental action that allegedly involved no policy discretion. Petitioners, of course, have not proved their factual allegations, but they are not required to do so on a motion to dismiss. If those allegations are correct—that is, if the Bureau's policy did not allow the official who took the challenged action to release a noncomplying lot on the basis of policy considerations—the discretionary function exception does not bar the claim.[13] Because petitioners may yet show, on the basis of materials obtained in discovery or otherwise, that the conduct challenged here did not involve the permissible exercise of policy discretion, the invocation of the discretionary function exception to dismiss petitioners' lot release claim was improper.

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[13] The Government's own argument before this Court provides some support for petitioners' allegation regarding the Bureau's policy. The Government indicated that the Bureau reviews each lot of vaccine and decides whether it complies with safety standards. See Tr. of Oral Arg. 42. The Government further suggested that if an employee knew that a lot did not comply with these standards, he would have no discretion to approve the release of the lot. See *id.*, at 31–32.

IV

For the foregoing reasons, the Court of Appeals erred in holding that the discretionary function exception required the dismissal of petitioners' claims respecting the licensing of Orimune and the release of a particular vaccine lot. The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

LOEFFLER *v.* FRANK, POSTMASTER GENERAL OF THE UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 86-1431. Argued January 11, 1988—Decided June 13, 1988

Petitioner was discharged from his position with the United States Postal Service. Contending that his discharge resulted from sex discrimination, petitioner brought this suit against the Postmaster General in Federal District Court pursuant to § 717 of Title VII of the Civil Rights Act of 1964. The court found for petitioner and ordered his reinstatement with backpay, but refused to award prejudgment interest. The Court of Appeals affirmed the denial of prejudgment interest. Relying in part on *Library of Congress* v. *Shaw*, 478 U. S. 310, which held that sovereign immunity barred the payment of interest on attorney's fees awarded against the Library of Congress under Title VII, the court concluded that Congress had not waived the Postal Service's sovereign immunity as to prejudgment interest in a Title VII suit, even though Congress had provided in the 1970 Postal Reorganization Act, 39 U. S. C. § 401(1), that the Postal Service may "sue and be sued."

Held: Prejudgment interest may be awarded in a suit against the Postal Service brought under Title VII. Pp. 554–565.

(a) By launching the Service into the commercial world and including a sue-and-be-sued clause in the Postal Reorganization Act, Congress removed the Service's cloak of sovereignty and gave it the status of a private commercial enterprise. The clause must be liberally construed, and the Service's liability must be presumed to be the same as that of any other business. Thus, Congress is presumed to have waived any otherwise existing immunity of the Service from interest awards. None of the exceptions to the liberal-construction rule operate to overcome this presumption. *Franchise Tax Board of California* v. *USPS*, 467 U. S. 512. Pp. 554–557.

(b) Since Title VII authorizes interest awards as a normal incident of suits against private parties, and since Congress, by enacting the sue-and-be-sued clause in the Postal Reorganization Act, has waived the Service's immunity from such awards, respondent may be subjected to an interest award in this case. Pp. 557–558.

(c) There is no merit to respondent's contention that the waiver of sovereign immunity effected by the sue-and-be-sued clause has no force in this case. The history of the Postal Reorganization Act, with its emphasis on the availability of strong remedies for discrimination in the federal employment context, makes clear that Congress' failure to extend Title VII protections to Postal Service employees did not reflect an intent to circumscribe the waiver of sovereign immunity effected by the sue-and-be-sued clause, but, rather, was a determination that a Title VII cause of action was unnecessary in light of such alternative remedies. Nor is the sue-and-be-sued clause irrelevant merely because when Congress extended a Title VII cause of action to federal employees in 1972, it included special procedures and limitations applicable only in actions against federal defendants. Neither the language of § 717 nor its legislative history indicates that the waiver of sovereign immunity it effected was intended to narrow the waiver of sovereign immunity of entities subject to sue-and-be-sued clauses. Pp. 560–562.

(d) Nor is there merit to respondent's contention that the statute that provides petitioner with his cause of action, § 717 of Title VII, does not authorize interest awards. Congress expressly incorporated in § 717 provisions of Title VII that allow an interest award, and a § 717 suit, once commenced, is delineated by the same provisions as a suit against a private employer, who is liable for prejudgment interest in a Title VII suit. *Library of Congress* v. *Shaw*, *supra*, is not to the contrary. That case started from the rule that, absent express consent by Congress, the Government is immune from interest awards, and found that Title VII did not waive the Library of Congress' immunity from interest. However, the Library of Congress, unlike the Postal Service, was not a sue-and-be-sued agency that Congress had launched into the commercial world and thereby broadly waived the agency's sovereign immunity. Pp. 563–565.

806 F. 2d 817, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, STEVENS, and SCALIA, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR, J., joined, *post*, p. 566. KENNEDY, J., took no part in the consideration or decision of the case.

Lisa S. Van Amburg argued the cause and filed briefs for petitioner.

Charles A. Rothfeld argued the cause for respondent. With him on the brief were *Solicitor General Fried*, *Deputy*

Solicitor General Ayer, *John F. Daly*, and *Stephen E. Alpern*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether prejudgment interest may be awarded in a suit against the United States Postal Service brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq*.

I

Petitioner Theodore J. Loeffler was discharged from his position as a rural letter carrier for the United States Postal Service.[1] Petitioner appealed his termination to the Merit Systems Protection Board and, when his discharge was affirmed there, sought administrative relief from the Equal Employment Opportunity Commission. This, also, was without success. Contending that his discharge resulted from

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**Julius LeVonne Chambers*, *Gail J. Wright*, and *Charles Stephen Ralston* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* urging reversal.

[1] Petitioner's discharge arose from his practice of casing boxholder mail. "Boxholder" mail is third-class mail that does not bear the name and address of a particular individual but is given to the postal carrier in a single bundle for delivery to each current resident or possessor of a rural-delivery mailbox. The District Court explained: "'Casing' is the practice of inserting the boxholders in each separation of the delivery case in the post office work area prior to delivery, and then inserting the first or second class mail inside the boxholders so that the boxholders form a convenient sleeve for the rest of the pieces of mail and thus make delivery quicker and easier. The alternative to casing the boxholders is to carry them as separate bundles and insert them into each individual post box during delivery." App. to Pet. for Cert. A-28.

In 1979, pursuant to directives from Postal Service headquarters in Washington, D. C., all five rural carriers at the Chesterfield, Mo., Post Office, including petitioner, were instructed not to case the boxholders. The rule against casing was openly violated by petitioner and by two female rural carriers. Although all three carriers repeatedly ignored the rule, only petitioner was discharged, while the two female carriers were disciplined mildly or not at all.

sex discrimination, petitioner subsequently brought this suit against the Postmaster General of the United States in his official capacity,[2] pursuant to § 717 of Title VII, as amended, 42 U. S. C. § 2000e–16. After a bench trial, the United States District Court for the Eastern District of Missouri concluded that petitioner was a victim of discrimination and ordered his reinstatement with backpay. App. to Pet. for Cert. A–26. Relying on a decision of its controlling court, *Cross* v. *USPS*, 733 F. 2d 1327, 1332 (CA8 1984) (en banc), cert. denied, 470 U. S. 1051 (1985), the District Court refused to award prejudgment interest. App. to Pet. for Cert. A–21. (In *Cross*, an equally divided Court of Appeals had affirmed the same District Judge's conclusion that sovereign immunity barred an award of prejudgment interest in a Title VII suit against the Postal Service.)

The United States Court of Appeals for the Eighth Circuit affirmed the denial of prejudgment interest. *Loeffler* v. *Carlin*, 780 F. 2d 1365, 1370–1371 (1985). Concluding that the District Court's reliance on *Cross* was "understandable and proper," *id.*, at 1370, the court stated: "If the question of prejudgment interest is to be reconsidered, it should be reconsidered by the Court en banc." *Id.*, at 1371.

Subsequently, the Eighth Circuit undertook that en banc reconsideration, and, by a 6-to-5 vote, affirmed the judgment of the District Court. *Loeffler* v. *Tisch*, 806 F. 2d 817 (1986). The majority adopted the reasoning of the majority of the original panel in *Cross*, 733 F. 2d 1327, which concluded that Congress had not waived the sovereign immunity of the Postal Service with regard to prejudgment interest in a Title

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[2] At the time this suit was filed, William F. Bolger, then Postmaster General, was the named defendant. While the case was pending on appeal, Bolger was succeeded as Postmaster General and as defendant by Paul N. Carlin and, subsequently, by Preston R. Tisch. After oral argument before this Court, Tisch was succeeded by Anthony M. Frank. General Frank has been substituted as respondent pursuant to this Court's Rule 40.3.

VII suit. The majority found its conclusion "strongly reinforced" by this Court's recent decision in *Library of Congress* v. *Shaw*, 478 U. S. 310 (1986), which the majority interpreted as "holding that Congress, in enacting Title VII, did not waive the Government's immunity from interest."[3] 806 F. 2d, at 818. In the majority's view, Congress' provision in the 1970 Postal Reorganization Act, 39 U. S. C. § 401(1), that the Postal Service may "sue and be sued" was irrelevant to the question before it, because "a sue-and-be-sued clause does not expand the obligations of a federal entity in a suit brought pursuant to another statute that is itself a waiver of immunity and which constitutes an exclusive remedy." 806 F. 2d, at 819.

The 5-judge dissent adopted the reasoning of the dissent in the *Cross* panel submission. That dissent had concluded that "limits on prejudgment interest have been imposed solely because of the barrier of sovereign immunity," 733 F. 2d, at 1332, and that the sue-and-be-sued clause in the Postal Reorganization Act had eliminated that barrier in actions against the Postal Service. The dissent noted this Court's observation in *Shaw:* "'The no-interest rule is . . . inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise.'" 806 F. 2d, at 822, quoting *Shaw*, 478 U. S., at 317, n. 5. In the dissent's view, the Postal Service fits within this exception and, therefore, "an award of prejudgment interest against the Postal Service under Title VII is not barred by sovereign immunity." 806 F. 2d, at 823.

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[3] In *Shaw*, the Court held that sovereign immunity bars the payment of interest on attorney's fees awarded against the Library of Congress under Title VII. The Court's holding came "against the backdrop of the no-interest rule," *Shaw*, 478 U. S., at 319, which provides: "Apart from constitutional requirements, in the absence of specific provision by contract or statute, or 'express consent . . . by Congress,' interest does not run on a claim against the United States." *United States* v. *Louisiana*, 446 U. S. 253, 264–265 (1980), quoting *United States* v. *N. Y. Rayon Importing Co.*, 329 U. S. 654, 659 (1947).

Because of a conflict with the views of the Eleventh Circuit expressed in *Nagy* v. *USPS*, 773 F. 2d 1190 (1985), we granted certiorari to decide whether, in a Title VII suit, prejudgment interest may be awarded against the Postal Service. *Sub nom. Loeffler* v. *Tisch*, 483 U. S. 1004 (1987).

II

A

The question of statutory interpretation here presented, involving the interaction of the Postal Reorganization Act and Title VII, lends itself to straightforward resolution. Absent a waiver of sovereign immunity, the Federal Government is immune from suit. *United States* v. *Sherwood*, 312 U. S. 584, 586 (1941). Congress, however, has waived the sovereign immunity of certain federal entities from the times of their inception by including in the enabling legislation provisions that they may sue and be sued. In *FHA* v. *Burr*, 309 U. S. 242, 245 (1940), the Court explained:

> "[S]uch waivers by Congress of governmental immunity . . . should be liberally construed. . . . Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress

> launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be." (Footnote omitted.)

Accord, *Franchise Tax Board of California* v. *USPS*, 467 U. S. 512, 517–518 (1984); *Reconstruction Finance Corporation* v. *J. G. Menihan Corp.*, 312 U. S. 81, 84–85 (1941); see also *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381 (1939). Encompassed within this liberal-construction rule is the principle "that the words 'sue and be sued' normally include the natural and appropriate incidents of legal proceedings." *J. G. Menihan Corp.*, 312 U. S., at 85.

In accord with this approach, this Court has recognized that authorization of suits against federal entities engaged in commercial activities may amount to a waiver of sovereign immunity from awards of interest when such awards are an incident of suit. For example, in *Standard Oil Co.* v. *United States*, 267 U. S. 76 (1925), the Court reviewed a suit brought under § 5 of the Act of September 2, 1914, ch. 293, 38 Stat. 711, on insurance claims issued by the Bureau of War Risk Insurance. The Court concluded: "When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business." 267 U. S., at 79. Accordingly, interest was allowed. *Ibid.* See also *National Home for Disabled Volunteer Soldiers* v. *Parrish*, 229 U. S. 494 (1913) (interest allowed against eleemosynary agency that Congress had authorized "to sue and be sued"). Cf. *Library of Congress* v. *Shaw*, 478 U. S., at 317, n. 5.

When Congress created the Postal Service in 1970, it empowered the Service "to sue and be sued in its official name."

39 U. S. C. §401(1). This sue-and-be-sued clause was a part of Congress' general design that the Postal Service "be run more like a business than had its predecessor, the Post Office Department." *Franchise Tax Board of California* v. *USPS*, 467 U. S., at 520. In *Franchise Tax Board*, this Court examined, in the context of an order issued by a state administrative agency, the extent to which Congress had waived the sovereign immunity of the Postal Service. After noting that "Congress has 'launched [the Postal Service] into the commercial world,'" *ibid.*, the Court held that the sue-and-be-sued clause must be liberally construed and that the Postal Service's liability must be presumed to be the same as that of any other business. Because the order to the Postal Service to withhold employees' wages had precisely the same effect on the Service's ability to operate efficiently as did such orders on other employers subject to the state statute that had been invoked, and because the burden of complying with the order would not impair the Service's ability to perform its functions, the Court concluded that there was no basis for overcoming the presumption that immunity from the state order had been waived. See *id.*, at 520, and n. 14.

Our unanimous view of the Postal Service expressed in *Franchise Tax Board* is controlling here. By launching "the Postal Service into the commercial world," and including a sue-and-be-sued clause in its charter, Congress has cast off the Service's "cloak of sovereignty" and given it the "status of a private commercial enterprise." *Shaw*, 478 U. S., at 317, n. 5. It follows that Congress is presumed to have waived any otherwise existing immunity of the Postal Service from interest awards.

None of the exceptions to the liberal-construction rule that guides our interpretation of the waiver of the Postal Service's immunity operates to overcome this presumption. Subjecting the Service to interest awards would not be inconsistent with the Postal Reorganization Act, 39 U. S. C. § 101 *et seq.*, the statutory scheme that created the Postal Service, nor would it pose a threat of "grave interference" with the Service's operation. *FHA* v. *Burr*, 309 U. S., at 245. Finally, we find nothing in the statute or its legislative history to suggest that "it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense," *ibid.*, with regard to interest awards. To the contrary, since Congress expressly included several narrow and specific limitations on the operation of the sue-and-be-sued clause, see 39 U. S. C. § 409,[4] none of which is applicable here, the natural inference is that it did not intend other limitations to be implied.

Accordingly, we conclude that, at the Postal Service's inception, Congress waived its immunity from interest awards, authorizing recovery of interest from the Postal Service to the extent that interest is recoverable against a private party as a normal incident of suit.

B

Respondent concedes, and apparently all the United States Courts of Appeals that have considered the question agree, that Title VII authorizes prejudgment interest as part of the backpay remedy in suits against private employers.[5] This conclusion surely is correct. The backpay award authorized by § 706(g) of Title VII, as amended, 42 U. S. C. § 2000e–5(g), is a manifestation of Congress' intent to make "persons whole for injuries suffered through past discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 421 (1975).[6] Prejudgment interest, of course, is "an element of complete compensation." *West Virginia* v. *United States*, 479 U. S. 305, 310 (1987). Thus, since Title VII authorizes interest awards as a normal incident of suits against private parties, and since Congress has waived the Postal Service's immunity from such awards, it follows that respondent may be subjected to an interest award in this case.

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[4] Section 409 provides in part:

"(b) Unless otherwise provided in this title, the provisions of title 28 relating to service of process, venue, and limitations of time for bringing action in suits in which the United States, its officers, or employees are parties, . . . shall apply in like manner to suits in which the Postal Service, its officers, or employees are parties.

"(c) The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service."

[5] See Brief for Respondent 9. See also *Conway* v. *Electro Switch Corp.*, 825 F. 2d 593, 602 (CA1 1987); *Green* v. *USX Corp.*, 843 F. 2d 1511, 1530 (CA3 1988); *United States* v. *Gregory*, 818 F. 2d 1114, 1118 (CA4), cert. denied, 484 U. S. 847 (1987); *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 727 F. 2d 473, 478 (CA5), cert. denied, 467 U. S. 1243 (1984); *EEOC* v. *Wooster Brush Co. Employees Relief Assn.*, 727 F. 2d 566,

III

A

In order to address respondent's arguments, it is necessary to explain briefly the manner in which Title VII provides a cause of action to federal employees. As originally enacted in 1964, Title VII, by excluding federal entities from its definition of employer, see § 701(b) of Title VII, 42 U. S. C. § 2000e(b), did not provide a cause of action to federal employees. *Brown* v. *GSA*, 425 U. S. 820, 825 (1976). In 1972, Congress amended Title VII by adding its § 717, which brought federal employees, including employees of the Postal Service, within the ambit of Title VII. Equal Employment

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578–579 (CA6 1984); *Taylor* v. *Philips Industries, Inc.*, 593 F. 2d 783, 787 (CA7 1979); *Washington* v. *Kroger Co.*, 671 F. 2d 1072, 1078 (CA8 1982); *Domingo* v. *New England Fish Co.*, 727 F. 2d 1429, 1446 (CA9), modified on other grounds, 742 F. 2d 520 (1984); *Nagy* v. *USPS*, 773 F. 2d 1190 (CA11 1985). Cf. *EEOC* v. *County of Erie*, 751 F. 2d 79, 82 (CA2 1984) (interest allowed on backpay award under Equal Pay Act); *Shaw* v. *Library of Congress*, 241 U. S. App. D. C. 355, 361, 747 F. 2d 1469, 1475 (1984) (interest allowed on Title VII attorney's fees award), rev'd on other grounds, 478 U. S. 310 (1986).

[6] Indeed, to ensure that victims of employment discrimination would be provided complete relief, Congress also gave the courts broad equitable powers. See § 706(g) of Title VII, as amended, 42 U. S. C. § 2000e–5(g); see generally *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 418–421.

Opportunity Act of 1972, 86 Stat. 111, 42 U. S. C. § 2000e–16. In so doing, Congress intended to provide federal employees with "'the full rights available in the courts as are granted to individuals in the private sector under Title VII.'" *Chandler* v. *Roudebush*, 425 U. S. 840, 841 (1976), quoting S. Rep. No. 92–415, p. 16 (1971). Section 717(a) mandates that all personnel actions affecting federal employees covered by that section "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–16(a). Section 717(b) provides a detailed administrative enforcement mechanism, and § 717(c) permits an aggrieved employee to file a civil action in federal district court, provided the employee has met certain requirements regarding exhaustion of administrative remedies. Thus, in enacting § 717, Congress simultaneously provided federal employees with a cause of action under Title VII and effected a waiver of the Government's immunity from suit. See *Library of Congress* v. *Shaw*, 478 U. S., at 319. The waiver of sovereign immunity effected by § 717, however, was a limited one. "In making the Government liable as a defendant under Title VII, . . . Congress did not waive the Government's traditional immunity from interest." *Id.*, at 323.

Based on this background, respondent channels his attack into two principal arguments. First, respondent contends that the waiver of sovereign immunity effected by the "sue-and-be-sued" clause of the Postal Reorganization Act, 39 U. S. C. § 401(1), has no bearing here, regardless of its scope. In respondent's view, the only waiver of sovereign immunity relevant to a Title VII suit against the Postal Service is the waiver of sovereign immunity found in Title VII itself. Second, respondent argues that, even if the waiver of sovereign immunity provided by § 401 does control, the cause of action that § 717 affords to a Postal Service employee is distinct from the cause of action afforded a private-sector employee and does not provide a basis for an award of prejudgment interest. We examine these contentions in turn.

B

In support of his argument that the sue-and-be-sued clause of the Postal Reorganization Act, 39 U. S. C. §401(1), has no force in this case, respondent initially relies on Congress' failure, at the time it created the Postal Service in 1970, to extend Postal Service employees a cause of action under Title VII.[7] In respondent's view, this failure constituted a decision to leave intact what respondent characterizes as the "explicit" decision of the Congress that enacted Title VII in 1964 to preserve the sovereign immunity of federal employers in Title VII suits. But the history of the Postal Reorganization Act discussed in n. 7, *supra*, with its emphasis on the availability of strong remedies for discrimination in the federal employment context, makes clear that Congress' failure to extend Title VII protections to Postal Service employees did not reflect an intent to circumscribe the waiver of sovereign immunity effected by the sue-and-be-sued clause, but, rather, was a determination that a Title VII cause of action was unnecessary in light of these alternative remedies. The reason Postal Service employees could not bring an employment discrimination suit under Title VII in 1970—indeed, the reason that federal employees generally could not do so—stemmed not from the Postal Reorganization Act, but from a restriction in Title VII itself: the exclusion of federal entities from the definition of the term "employer." The Postal Reorganization Act is utterly silent as to Title VII. We reject the notion that Congress' silence when it creates a new federal entity, with regard to a cause of action that is generally unavailable to federal employees, can be construed as a limitation on the waiver of that entity's sovereign immunity effected by the inclusion of a sue-and-be-sued clause.

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[7] When the Senate was considering its version of the Postal Reorganization Act, Senator Cook proposed a floor amendment "to give postal service employees the equal employment opportunity rights provided by title VII of the Civil Rights Act of 1964, that employees in private industry have benefited from since 1964." 116 Cong. Rec. 22279 (1970). The Senate approved the amendment by a 93–0 vote. See *id.*, at 22279–22280. The Cook amendment was deleted in conference, however, because the conferees were persuaded that the "present law affecting all Federal employees, including employees under the new Postal Service, guarantee[d] antidiscrimination provisions . . . of greater benefit . . . than the provisions of title VII of the Civil Rights Act of 1964." *Id.*, at 26953 (remarks of Sen. McGee); see also, *id.*, at 26956, 26957 (remarks of Sen. McGee); *id.*, at 27597 (remarks of Rep. Daniels). Senator McGee, who presented the Conference Report to the Senate, "guarantee[d]" that if the current bill did not "achieve the laudable purpose that the Cook amendment intended," the Senate would immediately enact appropriate legislation. *Id.*, at 26957 (remarks of Sen. McGee).

Respondent would find further support for his argument that the sue-and-be-sued clause is irrelevant to this case in the manner in which Congress extended a Title VII cause of action to federal employees in 1972. Specifically, respondent relies on a distinction between causes of action that may be asserted against commercial entities generally, as, for example a state garnishment statute, see *Franchise Tax Board of California* v. *USPS*, 467 U. S. 512 (1984), and causes of action, such as § 717 of Title VII, that contain special procedures and limitations applicable only to federal defendants. Respondent contends that while a sue-and-be-sued clause may apply to a suit against a federal entity in the former class of actions, it has no bearing in the latter. We are not persuaded by this argument for two reasons.

First, this is an argument for an implied exception to the waiver of sovereign immunity effected by a sue-and-be-sued clause. Yet respondent offers no reason for concluding that Congress intended his implied exception to be added to those that this Court articulated in *FHA* v. *Burr*, 309 U. S., at 245, and we see no reason why we should do so.

Second, when Congress intends the waiver of sovereign immunity in a new cause of action directed against federal entities to be exclusive,—in effect, to limit the force of "sue-and-be-sued" clauses—it has said so expressly. Congress' waiver of the sovereign immunity of the United States for certain torts of federal employees, in the Federal Tort Claims

Act (FTCA), 28 U. S. C. §§1346, 2671–2680, provides an example. Prior to the FTCA's enactment, certain federal agencies were already suable in tort. Although Congress enacted the FTCA to allow suits against many agencies that previously had been immune from suits in tort, it also wished to "place torts of 'suable' agencies of the United States upon precisely the same footing as torts of 'nonsuable' agencies." H. R. Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945). Accordingly, Congress expressly limited the waivers of sovereign immunity that it had previously effected through "sue-and-be-sued" clauses and stated that, in the context of suits for which it provided a cause of action under the FTCA, "sue-and-be-sued" agencies would be subject to suit only to the same limited extent as agencies whose sovereign immunity from tort suits was being waived for the first time:

> "The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive." 28 U. S. C. §2679(a).

In contrast, neither the language of §717 of Title VII nor its legislative history contains an expression that the waiver of sovereign immunity it effected was intended also to narrow the waiver of sovereign immunity of entities subject to sue-and-be-sued clauses. Accordingly, we reject respondent's contention that 39 U. S. C. §401(1) has no application here.[8]

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[8] Respondent also seeks comfort from the concededly technical distinction that this suit, in accordance with the provisions of §717(c) of Title VII, 42 U. S. C. §2000e–16(c), named the head of the Postal Service as defendant, while 39 U. S. C. §401(1) makes the Postal Service amenable to suit "in its official name." In *FHA* v. *Burr*, 309 U. S. 242, 249–250 (1940), however, we found such a distinction between a suit against the head of an agency and a suit against the agency itself irrelevant to the force of a "sue-and-be-sued" clause. In *Burr*, the "sue-and-be-sued" clause in §1 of the National Housing Act, 48 Stat. 1246, as amended by §344 of the Banking

C

Respondent next argues that, even if the waiver of sovereign immunity effected by § 401(1) is controlling, an award of prejudgment interest is inappropriate because the statute that provides petitioner with his cause of action, § 717 of Title VII, does not authorize interest awards. Respondent starts from the premise that had Congress expressly stated that prejudgment interest is unavailable in actions under § 717, the outcome of this case would be beyond dispute. Therefore, it is claimed, "[t]he fact that the 'no-interest' rule is not made explicit in the statute, but rather is a conclusion drawn by this Court in *Shaw* . . . , does not make the rule any less binding." Brief for Respondent 16. This argument, in our view, misunderstands both the nature of the remedy § 717 affords and the basis of our holding in *Shaw*.

Without doubt, petitioner's cause of action in this case is derived from § 717. We do not disagree with respondent that, had § 717 explicitly stated that the cause of action it provided did not include prejudgment interest, such interest would be unavailable in this case. But Congress made no express statement of that kind. To the contrary, Congress expressly incorporated in § 717 provisions of Title VII that allow an interest award. Specifically, § 717(c), 42 U. S. C. § 2000e–16(c), provides that, after pursuing various manda-

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Act of 1935, 49 Stat. 722, applied to the Administrator of the Federal Housing Authority acting in his official capacity. The Court concluded that this waiver of sovereign immunity permitted actions against the Authority itself, because under the terms of the Act, all the powers of the Authority were exercised through the Administrator. This case presents the inverse situation: the "sue-and-be-sued" clause authorizes suits against the agency, and the defendant before the Court is the head of the agency acting in his official capacity. However, the same logic applies. Whenever the head of the Postal Service acts in his official capacity, he is acting in the name of the Postal Service. Thus, here, as in *Burr*, the acts of the named defendant are always chargeable as acts of the person or entity subject to the sue-and-be-sued clause. We therefore are not persuaded by respondent's procedural distinction.

tory administrative remedies, an unsatisfied § 717 plaintiff "may file a civil action as provided in section 2000e–5 of this title," which governs enforcement actions against private employers.

Thus, although petitioner's cause of action under § 717 is circumscribed by mandatory administrative prerequisites that are distinct from the prerequisites for a civil suit brought against a private employer, a § 717 suit, once commenced, is delineated by the same provisions as a suit against a private employer. Most importantly for the purposes of this case, § 717(d) explicitly incorporates § 706(g) of Title VII into the cause of action provided. Section 706(g) allows a court to "order such affirmative action as may be appropriate, . . . includ[ing] . . . back pay . . . , or any other equitable relief as the court deems appropriate." 42 U. S. C. § 2000e–5(g). This provision thus governs the remedies available in both a Title VII suit brought against a federal employer under § 717 and a Title VII suit brought against a private employer. Cf. *Chandler* v. *Roudebush*, 425 U. S., at 843–848. And, just as this section provides for prejudgment interest in a Title VII suit against a private employer, it provides for prejudgment interest in a Title VII suit brought under § 717.

Respondent's view that *Shaw* stands for the proposition that § 717 implicitly states that prejudgment interest is unavailable in all suits brought under that section misunderstands the basis of our holding in that case. In *Shaw*, the Court faced the question whether § 706(k) of Title VII, 42 U. S. C. § 2000e–5(k), which provides that a party prevailing against the United States may recover attorney's fees from the United States, waived the sovereign immunity of the Library of Congress with respect to interest on an attorney's fees award. Unlike the Postal Service, the Library of Congress was not a "sue-and-be-sued" agency that Congress had "'launched . . . into the commercial world,'" and thereby broadly waived sovereign immunity. *Franchise Tax Board of California* v. *USPS*, 467 U. S., at 520, quoting *FHA* v.

Burr, 309 U. S., at 245. Thus, the starting point for our analysis was the "no-interest rule," which is to the effect that, absent express consent by Congress, the United States is immune from interest awards. See *Shaw*, 478 U. S., at 314. The dispositive question was not whether Title VII provided a cause of action that would allow recovery of interest, but, rather, whether Title VII contained an express waiver of the Library of Congress' immunity from interest. Because no such waiver is contained within Title VII, the no-interest rule barred recovery of interest from the Library of Congress on the plaintiff's attorney's fees award. This conclusion had nothing to do with the scope of a § 717 cause of action.

The Court expressly noted in *Shaw:* "The no-interest rule is . . . inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise." 478 U. S., at 317, n. 5. In creating the Postal Service, Congress did just that, and therefore, the no-interest rule does not apply to it. Thus, the search for an express waiver of immunity from interest within Title VII, which is all that *Shaw* was about, is unnecessary in this case. As discussed above, § 401 of the Postal Reorganization Act provides the waiver of sovereign immunity from interest awards against the Postal Service, and § 717 of Title VII provides the cause of action under which petitioner may recover interest.

IV

Accordingly, we conclude that interest may be awarded against the Postal Service in a Title VII suit. The judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

Essentially for the reasons stated by the en banc Court of Appeals below, I believe that prejudgment interest is not available in Title VII suits against the Postal Service. Accordingly, I respectfully dissent.

MICHIGAN *v.* CHESTERNUT

CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

No. 86-1824. Argued February 24, 1988—Decided June 13, 1988

Observing the approach of a police car on routine patrol, respondent began to run. The police followed him "to see where he was going," and, after catching up with him and driving alongside him for a short distance, observed him discarding a number of packets. Surmising that the pills subsequently discovered in the packets contained codeine, the police arrested him and, after a search of his person revealed other drugs and a hypodermic needle, charged him with possession of controlled substances in violation of Michigan law. At a preliminary hearing, a Magistrate dismissed the charges on the ground that respondent had been unlawfully seized during the police pursuit preceding his disposal of the packets. The trial court upheld the dismissal, and the Michigan Court of Appeals affirmed. Applying state precedents interpreting the Fourth Amendment to the Federal Constitution, the latter court ruled that any "investigatory pursuit" amounts to a seizure under *Terry* v. *Ohio*, 392 U. S. 1, since the defendant's freedom is restricted as soon as the officers begin their pursuit. The court also concluded that respondent's flight from the police was insufficient, by itself, to give rise to the particularized suspicion necessary to justify this kind of seizure.

Held: The officers' pursuit of respondent did not constitute a "seizure" implicating Fourth Amendment protections. Thus, the charges against him were improperly dismissed. Pp. 572–576.

(a) No bright-line rule applicable to all investigatory pursuits can be fashioned. Rather, the appropriate test is whether a reasonable man, viewing the particular police conduct as a whole and within the setting of all of the surrounding circumstances, would have concluded that the police had in some way restrained his liberty so that he was not free to leave. Pp. 572–574.

(b) Under this test, respondent was not "seized" before he discarded the drug packets. One officer's characterization of the police conduct as a "chase," standing alone, is insufficient to implicate the Fourth Amendment, since the police conduct—which consisted of a brief acceleration to catch up with respondent, followed by a short drive alongside him—would not have communicated to the reasonable person an attempt to capture him or otherwise intrude on his freedom of movement. The record does not reflect that the police activated a siren or flashers; commanded respondent to halt or displayed any weapons; or operated the car aggressively to block his course or to control his direction or speed. Thus, the police conduct was not so intimidating that respondent could reasonably have believed that he was not free to disregard the police presence and go about his business. The police therefore were not required to have a particularized and objective basis for suspecting him of criminal activity, in order to pursue him. Pp. 574–576.

157 Mich. App. 181, 403 N. W. 2d 74, reversed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, in which SCALIA, J., joined, *post*, p. 576.

Andrea L. Solak argued the cause for petitioner. With her on the briefs was *Timothy A. Baughman.*

Carole M. Stanyar argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried, Assistant Attorney General Weld, Deputy Solicitor General Bryson,* and *Paul J. Larkin, Jr.;* and for the States of Alabama et al. by *Michael W. Catalano* and by the Attorneys General for their respective States as follows: *Don Siegelman* of Alabama, *Grace Berg Schaible* of Alaska, *John Steven Clark* of Arkansas, *John J. Kelly* of Connecticut, *Charles M. Oberly* of Delaware, *Robert Butterworth* of Florida, *Warren Price III* of Hawaii, *Jim Jones* of Idaho, *Neil F. Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *Robert T. Stephan* of Kansas, *David L. Armstrong* of Kentucky, *William J. Guste, Jr.*, of Louisiana, *James E. Tierney* of Maine, *Hubert H. Humphrey III* of Minnesota, *Edwin L. Pittman* of Mississippi, *William L. Webster* of Missouri, *Mike Greely* of Montana, *W. Cary Edwards* of New Jersey, *Lacy H. Thornburg* of North Carolina, *Nicholas Spaeth* of North Dakota, *Robert Henry* of Oklahoma, *Travis Medlock* of South Carolina, *Roger A. Tellinghuisen* of South Dakota, *W. J. Michael Cody* of Tennessee, *David L. Wilkinson* of Utah, *Jeffrey Amestoy* of Vermont, *Mary Sue Terry* of Virginia, *Kenneth O. Eikenberry* of Washington, *Charles G. Brown* of West Virginia, *Don J. Hanaway* of Wisconsin, and *Joseph B. Meyer* of Wyoming.

Nancy Hollander and *David A. Freeman* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

Fred E. Inbau, Wayne W. Schmidt, James P. Manak, David Crump, Courtney A. Evans, and *Daniel B. Hales* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae.*

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we review a determination by the Michigan Court of Appeals that any "investigatory pursuit" of a person undertaken by the police necessarily constitutes a seizure under the Fourth Amendment of the Constitution. We conclude that the police conduct in this case did not amount to a seizure, for it would not have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.

I

Early on the afternoon of December 19, 1984, four officers riding in a marked police cruiser were engaged in routine patrol duties in Metropolitan Detroit. As the cruiser came to an intersection, one of the officers observed a car pull over to the curb. A man got out of the car and approached respondent Michael Mose Chesternut, who was standing alone on the corner. When respondent saw the patrol car nearing the corner where he stood, he turned and began to run. As Officer Peltier, one of those in the car, later testified, the patrol car followed respondent around the corner "to see where he was going." App. 25. The cruiser quickly caught up with respondent and drove alongside him for a short distance. As they drove beside him, the officers observed respondent discard a number of packets he pulled from his right-hand pocket. Officer Peltier got out of the cruiser to examine the packets. He discovered that they contained pills. While Peltier was engaged in this inspection, respondent, who had run only a few paces farther, stopped. Surmising on the basis of his experience as a paramedic that the pills contained codeine, Officer Peltier arrested respondent for the possession of narcotics and took him to the station house. During an ensuing search, the police discovered in respondent's hatband another packet of pills, a packet containing heroin, and a hypodermic needle. Respondent was charged with knowingly and intentionally possessing heroin, tablets containing codeine, and tablets containing diazepam, all in violation of Mich. Comp. Laws § 333.7403(2) (1980).

At a preliminary hearing, at which Officer Peltier was the only witness, respondent moved to dismiss the charges on the ground that he had been unlawfully seized during the police pursuit preceding his disposal of the packets. The presiding Magistrate granted the motion and dismissed the complaint.[1] Relying on *People* v. *Terrell*, 77 Mich. App. 676, 259 N. W. 2d 187 (1977),[2] the Magistrate ruled from the bench that a police "chase" like the one involved in this case implicated Fourth Amendment protections and could not be justified by the mere fact that the suspect ran at the sight of the police. App. 31–35. Applying a clearly-erroneous standard to the Magistrate's ruling, the trial court upheld the dismissal order. *Id.*, at 2–10.

The Michigan Court of Appeals "reluctantly" affirmed, 157 Mich. App. 181, 184, 403 N. W. 2d 74, 76 (1986), noting that "although we find the result unfortunate, we cannot say that the lower court's ruling was clearly erroneous under the present law or the facts presented." *Id.*, at 183, 403 N. W.

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[1] The Magistrate did not independently consider whether the codeine pills, if lawfully seized, established probable cause justifying respondent's arrest. The Fourth Amendment issue before us is therefore limited to the police conduct preceding and including respondent's disposal of the packets.

[2] In *Terrell*, a police officer got out of his unmarked car and "gave chase" on foot after allegedly observing the defendant stick his hand in his pocket and run at the sight of the officer. 77 Mich. App., at 678, 259 N. W. 2d, at 188. According to the officer, the defendant ran into an apartment building where the officer observed him drop a clear envelope containing a brown powdery substance. Having determined that the package might contain heroin, the officer arrested the defendant. At a pretrial hearing, the trial court granted the defendant's motion to suppress the envelope and its contents. The Michigan Court of Appeals affirmed, finding that the police "investigatory pursuit" constituted a seizure that was unjustified by any particularized suspicion that the defendant was engaged in criminal activity. *Id.*, at 679–680, 259 N. W. 2d, at 188–189.

2d, at 75. Like the courts below it, the Court of Appeals rested its ruling on state precedents interpreting the Fourth Amendment.[3] The court determined, first, that any "investigatory pursuit" amounts to a seizure under *Terry* v. *Ohio*, 392 U. S. 1 (1968). "As soon as the officers began their pursuit," the court explained, "defendant's freedom was restricted." 157 Mich. App., at 183, 403 N. W. 2d, at 75. The court went on to conclude that respondent's flight from the police was insufficient, by itself, to give rise to the particularized suspicion necessary to justify this kind of seizure. Because "the police saw [respondent] do absolutely nothing illegal nor did they observe other suspicious activity," the court determined that the investigatory pursuit had violated the Fourth Amendment's prohibition against unreasonable seizures. *Id.*, at 184, 403 N. W. 2d, at 76.

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[3] The Michigan Court of Appeals rested its holding on *People* v. *Terrell*, *supra*, and *People* v. *Shabaz*, 424 Mich. 42, 378 N. W. 2d 451 (1985), cert. dism'd (in view of that respondent's death), 478 U. S. 1017 (1986), both of which were to the effect that the defendant in question had been seized in violation of the Fourth Amendment of the United States Constitution. In *Shabaz*, the Michigan Supreme Court quoted "Michigan's analogous [constitutional] provision," without elaboration, in a footnote following a recitation of the Fourth Amendment. 424 Mich., at 52, n. 4, 378 N. W. 2d, at 455, n. 4. The Supreme Court said nothing to suggest that the Michigan Constitution's seizure provision provided an independent source of relief, and the court's entire analysis rested expressly on the Fourth Amendment and federal cases. Similarly, in *Terrell*, the Michigan Court of Appeals stated that the suppression of evidence and dismissal of charges against the defendant "was soundly based on existing law, state and Federal," but made clear that the scope of the right in question was defined "by the Fourth Amendment's general proscription against unreasonable searches and seizures." 77 Mich. App., at 679, 259 N. W. 2d, at 188, citing *Terry* v. *Ohio*, 392 U. S. 1, 20 (1968). In light of the bases for the courts' decisions in *Shabaz* and *Terrell*, we readily conclude that the decision below likewise rests on the Michigan courts' interpretation of the Federal Constitution and not on any adequate and independent state ground. See *Michigan* v. *Long*, 463 U. S. 1032 (1983). The defense in effect concedes this. See Tr. of Oral Arg. 38–39.

After the Michigan Supreme Court denied petitioner leave to appeal,[4] App. to Pet. for Cert. 9a, petitioner sought review here. We granted a writ of certiorari, 484 U. S. 895 (1987), to consider whether the officers' pursuit of respondent constituted a seizure implicating Fourth Amendment protections, and, if so, whether the act of fleeing, by itself, was sufficient to constitute reasonable suspicion justifying that seizure. Because we conclude that the officers' conduct did not constitute a seizure, we need not reach the second question.

II

A

Petitioner argues that the Fourth Amendment is never implicated until an individual stops in response to the police's show of authority. Thus, petitioner would have us rule that a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual. Respondent contends, in sharp contrast, that any and all police "chases" are Fourth Amendment seizures. Respondent would have us rule that the police may never pursue an individual absent a particularized and objective basis for suspecting that he is engaged in criminal activity.

Both petitioner and respondent, it seems to us, in their attempts to fashion a bright-line rule applicable to all investigatory pursuits, have failed to heed this Court's clear direction that any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account "'all of the circumstances surrounding the incident'" in each individual case. *INS* v. *Delgado*, 466 U. S. 210, 215 (1984), quoting *United States* v. *Mendenhall*, 446 U. S. 544, 554 (1980) (opinion of Stewart, J.). Rather than adopting either rule proposed by the parties and determining that an investigatory pursuit is or is not *necessarily* a seizure under the Fourth Amendment, we adhere to our traditional contextual approach, and determine only that, in this particular case, the police conduct in question did not amount to a seizure.

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[4] Two justices of the Michigan Supreme Court would have granted leave to appeal. See App. to Pet. for Cert. 10a.

B

In *Terry* v. *Ohio*, the Court noted:

> "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." 392 U. S., at 19, n. 16.

A decade later in *United States* v. *Mendenhall*, Justice Stewart, writing for himself and then JUSTICE REHNQUIST, first transposed this analysis into a test to be applied in determining whether "a person has been 'seized' within the meaning of the Fourth Amendment." 446 U. S., at 554.[5] The test provides that the police can be said to have seized an individual "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Ibid.* The Court has since embraced this test. See *INS* v. *Delgado*, 466 U. S., at 215. See also *Florida* v. *Royer*, 460 U. S. 491, 502 (1983) (plurality opinion); *id.*, at 514 (BLACKMUN, J., dissenting).

The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to "leave" will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs. Compare *United States* v. *Mendenhall*, *supra* (considering whether police request to see identification and ticket of individual who stopped upon police's approach constituted seizure), with *INS* v. *Delgado*, *supra* (considering whether INS "factory survey" conducted while employees continued to move about constituted seizure of entire work force).

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[5] Three other Justices, otherwise in the majority, chose not to reach the question whether the federal officers had seized respondent. 446 U. S., at 560 (opinion concurring in part and concurring in the judgment).

While the test is flexible enough to be applied to the whole range of police conduct in an equally broad range of settings, it calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police. The test's objective standard—looking to the reasonable man's interpretation of the conduct in question—allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment. 3 W. LaFave, Search and Seizure § 9.2(h), pp. 407–408 (2d ed. 1987 and Supp. 1988). This "reasonable person" standard also ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.

C

Applying the Court's test to the facts of this case, we conclude that respondent was not seized by the police before he discarded the packets containing the controlled substance. Although Officer Peltier referred to the police conduct as a "chase," and the Magistrate who originally dismissed the complaint was impressed by this description,[6] the characterization is not enough, standing alone, to implicate Fourth Amendment protections. Contrary to respondent's assertion that a chase necessarily communicates that detention is intended and imminent, Brief for Respondent 9, the police conduct involved here would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent's freedom of movement.[7] The record does not reflect that the police activated a siren or flashers; or that they commanded respondent to halt, or displayed any weapons; or that they operated the car in an aggressive manner to block respondent's course or otherwise control the direction or speed of his movement. Tr. of Oral Arg. 2, 11, 20.[8] While the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, this kind of police presence does not, standing alone, constitute a seizure.[9] Cf. *United States* v. *Knotts*, 460 U. S. 276 (1983)

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[6] At the preliminary hearing, the Magistrate interrupted the State's attorney, who was asserting that the police were simply performing routine patrolling duties, with the following:

"That would be fine until the Officer said we were chasing him in the car, otherwise I would agree with you. My ears picked up when the Officer said that, you know. He said we went around. I asked him why were you chasing him in the car, why were you chasing him and he said because he was running and we wanted to see where he was going." App. 29–30.

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[7] As Officer Peltier explained, the goal of the "chase" was not to capture respondent, but "to see where he was going." *Id.*, at 25. Of course, the subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted. *United States* v. *Mendenhall*, 446 U. S., at 554, n. 6 (opinion of Stewart, J.). See also 3 W. LaFave, Search and Seizure § 9.2(h), p. 407 (2d ed. 1987 and Supp. 1988) (uncommunicated intent of police irrelevant to determination of whether seizure occurred).

[8] The facts of this case are not identical to the facts involved in both *Terrell* and *Shabaz*, upon which the Michigan courts relied in finding a seizure in this case. In both *Terrell* and *Shabaz*, a police officer got out of the car to chase the pedestrian suspect on foot, after which the defendant abandoned the inculpatory evidence. *People* v. *Terrell*, 77 Mich. App., at 678, 259 N. W. 2d, at 188; *People* v. *Shabaz*, 424 Mich., at 47–48, 378 N. W. 2d, at 453. In *Shabaz*, the State appears to have stipulated that the chase, whose clear object was to apprehend the defendant, constituted a seizure. *Id.*, at 52, 378 N. W. 2d, at 455. While no similar stipulation was entered in *Terrell*, the goal of that chase appears to have been equally clear. We, of course, intimate no view as to the federal constitutional correctness of either of those Michigan state-court cases.

[9] The United States, which has submitted a brief as *amicus curiae*, suggests that, in some circumstances, police pursuit "will amount to a stop from the outset or from an early point in the chase, if the police command the person to halt and indicate that he is not free to go." Brief for United States as *Amicus Curiae* 13. Of course, such circumstances are not before

(holding that continuous surveillance on public thoroughfares by visual observation and electronic "beeper" does not constitute seizure); *Florida* v. *Royer*, 460 U. S., at 497 (plurality opinion) (noting that mere approach by law enforcement officers, identified as such, does not constitute seizure). Without more, the police conduct here—a brief acceleration to catch up with respondent, followed by a short drive alongside him—was not "so intimidating" that respondent could reasonably have believed that he was not free to disregard the police presence and go about his business. *INS* v. *Delgado*, 466 U. S., at 216. The police therefore were not required to have "a particularized and objective basis for suspecting [respondent] of criminal activity," in order to pursue him. *United States* v. *Cortez*, 449 U. S. 411, 417–418 (1981).

III

Because respondent was not unlawfully seized during the initial police pursuit, we conclude that charges against him were improperly dismissed. Accordingly, we reverse the judgment of the Michigan Court of Appeals, and remand the case to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE SCALIA joins, concurring.

It is no bold step to conclude, as the Court does, that the evidence should have been admitted, for respondent's unprovoked flight gave the police ample cause to stop him. The Court instead concentrates on the significance of the chase; and as to that it is fair to interpret its opinion as finding no more than an absence of improper conduct. We would do well to add that, barring the need to inquire about hot pur-

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us in this case. We therefore leave to another day the determination of the circumstances in which police pursuit could amount to a seizure under the Fourth Amendment.

suit, which is not at issue here, neither "chase" nor "investigative pursuit" need be included in the lexicon of the Fourth Amendment.

A Fourth Amendment seizure occurs when an individual remains in the control of law enforcement officials because he reasonably believes, on the basis of their conduct toward him, that he is not free to go. See, *e. g.*, *INS* v. *Delgado*, 466 U. S. 210, 215 (1984); *United States* v. *Mendenhall*, 446 U. S. 544, 554 (1980) (opinion of Stewart, J.). The case before us presented an opportunity to consider whether even an unmistakable show of authority can result in the seizure of a person who attempts to elude apprehension and who discloses contraband or other incriminating evidence before he is ultimately detained. It is at least plausible to say that whether or not the officers' conduct communicates to a person a reasonable belief that they intend to apprehend him, such conduct does not implicate Fourth Amendment protections until it achieves a restraining effect. The Court's opinion does not foreclose this holding, and I concur.

JOHNSON *v.* MISSISSIPPI

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 87–5468. Argued April 25, 1988—Decided June 13, 1988

Petitioner was convicted in a Mississippi court of murder. Finding the existence of three aggravating circumstances and that such circumstances outweighed the mitigating circumstances, the jury sentenced petitioner to death. The sole evidence supporting one of the aggravating circumstances—that petitioner had been "previously convicted of a felony involving the use or threat of violence to [another] person"—consisted of an authenticated copy of his commitment to prison in 1963 following his New York conviction of second-degree assault with intent to commit first-degree rape. The prosecutor repeatedly referred to the commitment document at the sentencing hearing. After the Mississippi Supreme Court affirmed petitioner's death sentence, the New York Court of Appeals reversed the 1963 conviction. However, the Mississippi Supreme Court denied petitioner's motion for postconviction relief from the death sentence, arguing, *inter alia,* that (1) petitioner had waived his right to challenge the New York conviction by not raising the point on direct appeal of his death sentence; (2) Mississippi's capital sentencing procedures could be rendered capricious and standardless if the postsentencing decision of another State could invalidate a Mississippi death sentence; and (3) the New York conviction provided adequate support for the death penalty even if it was invalid, since petitioner had served time on the conviction.

Held: By allowing petitioner's death sentence to stand despite the fact that it was based in part on the vacated New York conviction, the Mississippi Supreme Court violated the Eighth Amendment's prohibition against cruel and unusual punishment. Pp. 584–590.

(a) The New York conviction did not provide any legitimate support for petitioner's sentence. Its reversal deprives the prosecutor's sole piece of evidence as to the aggravating circumstance of any relevance to the sentencing decision. The fact that petitioner served time in prison pursuant to an invalid conviction does not make the conviction itself relevant, or prove that petitioner was guilty of the crime. Furthermore, use of the New York conviction in the sentencing hearing was clearly prejudicial since the prosecutor repeatedly urged the jury to give it weight in connection with its assigned task of balancing aggravating and mitigating circumstances "one against the other." Pp. 585–586.

(b) The state court's concern that its vacatur of the death sentence here would render its capital sentencing procedures capricious is unfounded. That court has itself held that the reversal of a Kentucky conviction supporting an enhanced sentence under Mississippi's habitual criminal statute justified postconviction relief. *Phillips* v. *State,* 421 So. 2d 476. A rule that regularly gives a defendant the benefit of such relief is not even arguably arbitrary or capricious and, in fact, reduces the risk that a capital sentence will be imposed arbitrarily. Pp. 586–587.

(c) The state court's conclusion that petitioner's failure to raise his claim on direct appeal constitutes a procedural bar under state law does not prevent this Court from considering the claim. Under federal law, such a bar can constitute an adequate and independent state ground for affirming a sentence only if it has been consistently or regularly applied. The bar raised here has not been so applied in Mississippi. In *Phillips* v. *State, supra,* the Mississippi Supreme Court held that collateral attack rather than direct appeal was the appropriate means of challenging a prior conviction used to enhance a habitual offender's sentence, and the Mississippi Supreme Court recently has applied that reasoning to facts substantially similar to those presented in this case. See *Nixon* v. *State,* 533 So. 2d 1078. Pp. 587–589.

(d) The State's argument that the decision below should be affirmed because the state court did not mention the New York conviction when it conducted its proportionality review of the death sentence on direct appeal is without merit since the fact that the sentence might be consistent with Mississippi law even absent evidence of the New York conviction is not determinative here. The error here extended beyond the mere invalidation of an aggravating circumstance supported by otherwise admissible evidence since the jury was allowed to consider evidence that has been revealed to be materially inaccurate. Moreover, the state court's express refusal to rely on harmless-error analysis in upholding petitioner's sentence was plainly justified on the facts of this case. Pp. 589–590.

511 So. 2d 1333, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined, *post,* p. 591. WHITE, J., filed a concurring opinion, in which REHNQUIST, C. J., joined, *post,* p. 591. O'CONNOR, J., concurred in the judgment.

Floyd Abrams argued the cause for petitioner. With him on the briefs were *Laurence T. Sorkin, Marshall Cox, Anthony Paduano,* and *Clive A. Stafford Smith.*

Marvin L. White, Jr., Assistant Attorney General of Mississippi, argued the cause for respondent. With him on the brief was *Mike Moore*, Attorney General.*

JUSTICE STEVENS delivered the opinion of the Court.

In 1982, petitioner was convicted of murder and sentenced to death. The sentence was predicated, in part, on the fact that petitioner had been convicted of a felony in New York in 1963. After the Mississippi Supreme Court affirmed petitioner's death sentence, the New York Court of Appeals reversed the 1963 conviction. Petitioner thereafter unsuccessfully sought postconviction relief from the Mississippi Supreme Court. The question presented to us is whether the state court was correct in concluding that the reversal of the New York conviction did not affect the validity of a death sentence based on that conviction.

I

On December 31, 1981, petitioner and three companions were stopped for speeding by a Mississippi highway patrolman. While the officer was searching the car, petitioner stabbed him and, in the ensuing struggle, one of his companions obtained the officer's gun and used it to kill him. Petitioner was apprehended, tried and convicted of murder, and sentenced to death. At the conclusion of the sentencing

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**Robert M. Kaufman, Jonathan Lang, Eric M. Freedman,* and *Steven B. Rosenfeld* filed a brief for the Committee on Civil Rights of the Association of the Bar of the City of New York as *amicus curiae* urging reversal.

Briefs of *amici curiae* were filed for the Attorney General of the State of New York by *Robert Abrams*, Attorney General, *pro se, O. Peter Sherwood,* Solicitor General, and *Suzanne M. Lynn, Susan Jacobs,* and *Barry Bassis,* Assistant Attorneys General; and for the Mississippi Public Defenders' Association by *Thomas M. Fortner.*

hearing, the jury found three aggravating circumstances,[1] any one of which, as a matter of Mississippi law, would have been sufficient to support a capital sentence. After weighing mitigating circumstances and aggravating circumstances "one against the other," the jury found "that the aggravating circumstances do outweigh the mitigating circumstances and that the Defendant should suffer the penalty of death." 13 Record 2290, 2294; App. 32. The Mississippi Supreme Court affirmed the conviction and sentence, *Johnson* v. *State*, 477 So. 2d 196 (1985), and we denied certiorari, 476 U. S. 1109 (1986).

The sole evidence supporting the aggravating circumstance that petitioner had been "previously convicted of a felony involving the use or threat of violence to the person of another" consisted of an authenticated copy of petitioner's commitment to Elmira Reception Center in 1963 following his conviction in Monroe County, New York, for the crime of second-degree assault with intent to commit first-degree rape. App. 8–9. The prosecutor repeatedly referred to that evidence in the sentencing hearing, stating in so many words: "I say that because of having been convicted of second degree assault with intent to commit first degree rape and capital murder that Samuel Johnson should die." 13 Record 2276; App. 23.[2]

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[1] The jury found the following aggravating circumstances:

"(1) That the defendant, Samuel Johnson, was previously convicted of a felony involving the use or threat of violence to the person of another.

"(2) That the defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody.

"(3) The capital murder was especially heinous, atrocious and cruel." 13 Record 2289, 2294; 511 So. 2d 1333, 1337 (Miss. 1987).

[2] Petitioner's version of the assault is described in an affidavit as follows:

"3. I have a good recollection of the facts concerning my 1963 conviction for assault second. Charles Taylor and I were in my brother's car, which he loaned to me, in the early morning hours of February 9, 1963. We picked up Malcena Doss after she was leaving another car. Doss was a

Prior to the assault trial in New York in 1963, the police obtained an incriminating statement from petitioner. Despite petitioner's objection that the confession had been coerced, it was admitted into evidence without a prior hearing on the issue of voluntariness. Moreover, after petitioner was convicted, he was never informed of his right to appeal. He made three efforts to do so without the assistance of counsel, each of which was rejected as untimely. After his Mississippi conviction, however, his attorneys successfully prosecuted a postconviction proceeding in New York in which they persuaded the Monroe County Court that petitioner had been unconstitutionally deprived of his right to appeal. The County Court then entered a new sentencing order from which petitioner was able to take a direct appeal. In that proceeding, the New York Court of Appeals reversed his conviction.[3] *People* v. *Johnson*, 69 N. Y. 2d 339, 506 N. E. 2d 1177 (1987).

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prostitute. After I had sex with her I told her I had no money to pay her and refused to pay her and she got angry. She took down the number of the car and later she told the police that I attacked her. I didn't attack her." App. 136–137 (affidavit of petitioner submitted to the County Court for Monroe County, New York, in support of his motion to vacate judgment of conviction).

[3] The New York court first determined that the appeal was "timely" in light of the "unusual circumstances of [petitioner's] case." 69 N. Y. 2d, at 341, 506 N. E. 2d, at 1178. The court pointed out that the State's actions had deprived petitioner of his right to an earlier appeal:

"It is undisputed that defendant was never advised of his right to appeal from the assault conviction and that, upon discovering that right, he made several timely and diligent *pro se* attempts to obtain review of the judgment through the avenues available to him at the time. Further, it is undisputed that the actions of this State prevented defendant from ever obtaining the review of the conviction to which he was entitled." *Ibid.*

Relying on concessions made by the State, the court then determined that all "records of [petitioner's] trial [had] been lost, that neither reconstruction nor a new trial [was] possible and [that petitioner had] raised appealable issues with possible merit." *Id.*, at 342, 506 N. E. 2d, at 1178. The court concluded in light of all the circumstances that "the only available remedy . . . [was] vacatur of the conviction and dismissal of the indictment." *Id.*, at 96–97.

Petitioner filed a motion in the Mississippi Supreme Court seeking postconviction relief from his death sentence on the ground that the New York conviction was invalid and could not be used as an aggravating circumstance. That motion was filed before the New York proceeding was concluded, but it was supplemented by prompt notification of the favorable action taken by the New York Court of Appeals. Nevertheless, over the dissent of three justices, the Mississippi Supreme Court denied the motion. 511 So. 2d 1333 (1987).

The majority supported its conclusion with four apparently interdependent arguments. First, it stated that petitioner had waived his right to challenge the validity of the New York conviction because he had not raised the point on direct appeal.[4] Second, it expressed concern that Mississippi's capital sentencing procedures would become capricious and standardless if the postsentencing decision of another State could have the effect of invalidating a Mississippi death sentence. *Id.*, at 1338. Third, it questioned whether the New York proceedings were "truly adversarial." *Id.*, at 1338–1339. Finally, it concluded that the New York conviction provided adequate support for the death penalty even if it was invalid, stating:

> "The fact remains that Johnson was convicted in 1963 by a New York court of a serious felony involving violence to a female for which he was imprisoned in that state. No New York court extended Johnson relief from his conviction before Johnson paid his debt to the state. If his crime was serious enough for him to be convicted and

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[4] The court stated:

"It is apparent that Johnson waived this claim, and it is procedurally barred. At no time during his direct appeal, or in his petition for certiorari to the U. S. Supreme Court did he argue his New York conviction was constitutionally invalid. Moreover, there is nothing to suggest he took any steps to vacate this conviction until he filed this petition. On appeal . . . [n]one [of petitioner's assignments of error] questioned the validity of his New York conviction. See *Evans* v. *State*, 485 So. 2d 276 (Miss. 1986), at 280–281." 511 So. 2d, at 1337.

> final enough for him to serve time in a penal institution, it had sufficient finality to be considered as an aggravating circumstance by a jury of this state. No death penalty verdict based upon this conviction need be vitiated by the subsequent relief granted more than twenty years later by the New York Court of Appeals." *Id.*, at 1339.

In reaching this conclusion, the court expressly disavowed any reliance on the fact that two of the aggravating circumstances found by the jury did not turn on the evidence of petitioner's prior conviction. *Id.*, at 1338; see, n. 8, *infra.*[5]

We granted certiorari to consider whether the Federal Constitution requires a reexamination of petitioner's death sentence. 484 U. S. 1003 (1988). We conclude that it does.

II

The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "'need for reliability in the determination that death is the appropriate punishment'" in any capital case. See *Gardner* v. *Florida*, 430 U. S. 349, 363–364 (1977) (WHITE, J., concurring in judgment) (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976)). Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,'" we have also made it clear that such decisions cannot be predicated on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." *Zant* v. *Stephens*, 462 U. S. 862, 884–885, 887, n. 24 (1983). The question in this case is whether allowing petitioner's death sentence to stand although based in part on a reversed conviction violates this principle.[6]

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[5] Three justices dissented. Relying on the logic of *Phillips* v. *State*, 421 So. 2d 476 (Miss. 1982), and the fact that there was "no way of ascertaining with confidence whether the prior conviction was a significant factor in the jury's determination that [petitioner] should suffer the penalty of death," the dissenters concluded that when an "'aggravating' prior conviction is vacated," "the defendant [is] entitled to relief from his enhanced sentence." 511 So. 2d, at 1344–1345 (Robertson, J., dissenting). They criticized the majority for giving the decision of the New York Court of Appeals "less than full faith and credit," refusing themselves to "indulge in the cynical assumption that the New York Court did less than its duty when it ordered [petitioner's] 1963 conviction vacated." *Id.*, at 1343–1344. The dissenters rejected the majority's invocation of a procedural bar, asserting that under Mississippi law petitioner had acted properly in first seeking relief in the New York courts and that he had no basis for a claim in the Mississippi courts until he obtained that relief. *Id.*, at 1343.

In its opinion the Mississippi Supreme Court drew no distinction between petitioner's 1963 conviction for assault and the underlying conduct that gave rise to that conviction. In Mississippi's sentencing hearing following petitioner's conviction for murder, however, the prosecutor did not introduce any evidence concerning the alleged assault itself; the only evidence relating to the assault consisted of a document establishing that petitioner had been convicted of that offense in 1963. Since that conviction has been reversed, unless and until petitioner should be retried, he must be presumed innocent of that charge. Indeed, even without such a presumption, the reversal of the conviction deprives the prosecutor's sole piece of documentary evidence of any relevance to Mississippi's sentencing decision.

Contrary to the opinion expressed by the Mississippi Supreme Court, the fact that petitioner served time in prison pursuant to an invalid conviction does not make the conviction itself relevant to the sentencing decision. The possible relevance of the conduct which gave rise to the assault charge is of no significance here because the jury was not presented with any evidence describing that conduct—the document submitted to the jury proved only the facts of conviction and confinement, nothing more. That petitioner was imprisoned is not proof that he was guilty of the offense; indeed, it would be perverse to treat the imposition of punishment pursuant to an invalid conviction as an aggravating circumstance.

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[6] Petitioner argues that the Mississippi court's skeptical treatment of the New York Court of Appeals' decision violated the Full Faith and Credit Clause of the United States Constitution. Although we find no merit in the state court's expression of concern about the adversarial character of the New York postconviction proceedings, we do not address the full faith and credit argument here because we do not understand the Mississippi Supreme Court's opinion to turn solely on its view of the validity of the New York judgment. Indeed, most of its reasoning might well be applied equally to the reversal of a prior Mississippi felony conviction. In all events, it is clear on the record before us that petitioner's death sentence is now predicated, in part, on a New York judgment that is not valid now, and was not valid when it was entered in 1963.

It is apparent that the New York conviction provided no legitimate support for the death sentence imposed on petitioner. It is equally apparent that the use of that conviction in the sentencing hearing was prejudicial. The prosecutor repeatedly urged the jury to give it weight in connection with its assigned task of balancing aggravating and mitigating circumstances "one against the other." 13 Record 2270; App. 17; see 13 Record 2282–2287; App. 26–30. Even without that express argument, there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be "decisive" in the "choice between a life sentence and a death sentence." *Gardner* v. *Florida*, *supra*, at 359 (plurality opinion).

We do not share the Mississippi Supreme Court's concern that its procedures would become capricious if it were to vacate a death sentence predicated on a prior felony conviction when such a conviction is set aside. A similar problem has frequently arisen in Mississippi, as well as in other States, in cases involving sentences imposed on habitual criminals. Thus, in *Phillips* v. *State*, 421 So. 2d 476 (Miss. 1982), the court held that the reversal of a Kentucky conviction that had provided the basis for an enhanced sentence pursuant to Mississippi's habitual criminal statute justified postconviction relief. A rule that regularly gives a defendant the benefit of such postconviction relief is not even arguably arbitrary or capricious. Cf. *United States* v. *Tucker*, 404 U. S. 443 (1972); *Townsend* v. *Burke*, 334 U. S. 736 (1948). To the contrary, especially in the context of capital sentencing, it reduces the risk that such a sentence will be imposed arbitrarily.

Finally, we are not persuaded that the state court's conclusion that under state law petitioner is procedurally barred from raising this claim because he failed to attack the validity of the New York conviction on direct appeal bars our consideration of his claim. In its brief before this Court, the State does not rely on the argument that petitioner's claim is procedurally barred because he failed to raise it on direct appeal. Because the State Supreme Court asserted this bar as a ground for its decision, however, we consider whether that bar provides an adequate and independent state ground for the refusal to vacate petitioner's sentence. "[W]e have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." *Henry* v. *Mississippi*, 379 U. S. 443, 447 (1965). "[A] state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.' *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964)." *Hathorn* v. *Lovorn*, 457 U. S. 255, 262–263 (1982); see *Henry* v. *Mississippi*, 379 U. S., at 447–448. We find no evidence that the procedural bar relied on by the Mississippi Supreme Court here has been consistently or regularly applied. Rather, the weight of Mississippi law is to the contrary. In *Phillips* v. *State*, *supra*, the Mississippi Supreme Court considered whether defendant could properly attack in a sentencing hearing a prior conviction which the State sought to use to enhance his sentence. The court made it clear that the sentencing hearing was not the appropriate forum for such an attack:

> "[T]he trial court is not required to go beyond the face of the prior convictions sought to be used in establishing the defendant's status as an habitual offender. If, on its face, the conviction makes a proper showing that a

> defendant's prior plea of guilty was both knowing and voluntary, that conviction may be used for the enhancement of the defendant's punishment under the Mississippi habitual offender act.
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> . . . . .
>
> "[A]ny such frontal assault upon the constitutionality of a prior conviction should be conducted in the form of an entirely separate procedure solely concerned with attacking that conviction. This role is neither the function nor the duty of the trial judge in a hearing to determine habitual offender status. Likewise, any such proceeding should be brought in the state in which such conviction occurred, pursuant to that state's established procedures. Should such proceeding in the foreign state succeed in overturning the conviction, then relief should be sought in Mississippi by petition for writ of error coram nobis." *Id.*, at 481–482.

The reasoning of *Phillips* suggests that the direct appeal of a subsequent conviction and concomitant enhanced sentence is not the appropriate forum for challenging a prior conviction that on its face appears valid. In directing that evidence of invalidation of such a conviction in another proceeding could be brought to the court's attention in a collateral attack of the subsequent conviction, the court did not suggest that the failure previously to raise the issue in the inappropriate forum would bar its consideration on collateral attack.

The Mississippi Supreme Court has applied its reasoning in *Phillips* to facts substantially similar to those presented in this case. In *Nixon* v. *State*, 533 So. 2d 1078 (1988), the court held that the reasoning of *Phillips* applied when a defendant in a capital case sought to attack the validity of a prior conviction introduced to support the finding of an aggravating circumstance at sentencing. In light of the Mississippi Supreme Court's decisions in *Phillips* and *Nixon*, we cannot conclude that the procedural bar relied on by the Mississippi Supreme Court in this case has been consistently or regularly applied. Consequently, under federal law it is not an adequate and independent state ground for affirming petitioner's conviction.[7]

In this Court Mississippi advances an argument for affirmance that was not relied upon by the State Supreme Court. It argues that the decision of the Mississippi Supreme Court should be affirmed because when that court conducted its proportionality review of the death sentence on petitioner's initial appeal, it did not mention petitioner's prior conviction in upholding the sentence. Whether it is true, as respondent argues, that even absent evidence of petitioner's prior conviction a death sentence would be consistent with Mississippi's practice in other cases, however, is not determinative of this case. First, the Mississippi Supreme Court expressly refused to rely on harmless-error analysis in upholding petitioner's sentence, 511 So. 2d, at 1338; on the facts of this case, that refusal was plainly justified.[8] Second, and more importantly, the error here extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate.[9]

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[7] Relying on the State Supreme Court's citation of *Evans* v. *State*, 485 So. 2d 276, 280–281 (Miss. 1986), see n. 4, *supra*, the State urges that the procedural bar invoked by the State Supreme Court here is distinct from the procedural bar applied in *Phillips* and *Nixon*. The State argues that the Mississippi Supreme Court was focused on petitioner's delay in attacking his 1963 conviction rather than on his failure to attack it in the Mississippi courts on direct appeal of his capital conviction. We cannot read so much into the citation of *Evans*. In *Evans*, the Mississippi Supreme Court held that a claim of ineffective assistance of counsel was procedurally barred because defendant had failed to raise the issue in a prior petition for writ of error *coram nobis*. In reaching this conclusion, the court was merely enforcing Miss. Code Ann. § 99–39–21(1) (Supp. 1987), which provides that "[f]ailure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred . . . ." 485 So. 2d, at 280. The citation to *Evans* simply supports our reading of the State Supreme Court's opinion to hold that petitioner's claim was procedurally barred because he failed to raise it in previous proceedings on direct appeal.

Our reading of the State Supreme Court's decision is further supported by the reasoning of the dissent, which reflects a similar understanding of the majority's discussion. In criticizing the majority for engaging in a "recent and illicit romance with procedural bars," 511 So. 2d, at 1343 (Robertson, J., dissenting), the dissent focused exclusively on the inconsistency between the court's holding in *Phillips* and its holding in petitioner's case.

Accordingly, the judgment is reversed, and the case is remanded to the Mississippi Supreme Court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR concurs in the judgment.

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[8] The court stated:

"As we noted, the jury found three aggravating circumstances existed, and of the three we have little doubt that in a rational sentencing process . . . the other two aggravating circumstances would carry greater weight than the New York conviction in determining Johnson's sentence. Indeed, the remoteness in time of the prior conviction was a mitigating circumstance. *Johnson* v. *State*, 477 So. 2d, 196, 219 (1985).

"We eschew "harmless error" in our reasoning, however, because the district attorney argued this particular aggravating circumstance as a reason to impose the death penalty. [*Ibid.*]" 511 So. 2d, at 1338.

The transcript fully supports the majority's decision, as well as the dissent's conclusion that petitioner's prior conviction was "vigorously" argued to the jury as a basis for imposing the death sentence. *Id.*, at 1342; see 13 Record 2271–2287; see *supra*, at 581.

[9] In *Zant* v. *Stephens*, 462 U. S. 862 (1983), we held that on the facts of that case the invalidation of an aggravating circumstance did not, under Georgia's capital sentencing scheme, require vacation of the death sentence. In reaching this holding, we specifically relied on the fact that the evidence adduced in support of the invalid aggravating circumstance was nonetheless properly admissible at the sentencing hearing. *Id.*, at 887.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

I join the Court's opinion except insofar as the judgment, which is without prejudice to further sentencing proceedings, does not expressly preclude the reimposition of the death penalty. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would direct that the resentencing proceedings be circumscribed such that the State may not reimpose the death sentence.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, concurring.

I join the Court's opinion, agreeing that the death sentence cannot stand, given the introduction of inadmissible and prejudicial evidence at the hearing before the jury. That evidence, however, was irrelevant to the other two aggravating circumstances found to be present, and I note that the case is remanded for further proceedings not inconsistent with the Court's opinion. It is left to the Mississippi Supreme Court to decide whether a new sentencing hearing must be held or whether that court should itself decide the appropriate sentence without reference to the inadmissible evidence, thus undertaking to reweigh the two untainted aggravating circumstances against the mitigating circumstances. Cf. *Cabana* v. *Bullock*, 474 U. S. 376 (1986).

WEBSTER, DIRECTOR OF CENTRAL INTELLIGENCE *v.* DOE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86–1294. Argued January 12, 1988—Decided June 15, 1988

Section 102(c) of the National Security Act of 1947 (NSA) authorizes the Director of the Central Intelligence Agency (CIA), "in his discretion," to terminate the employment of any CIA employee "whenever he shall deem such termination necessary or advisable in the interests of the United States." After respondent, a covert electronics technician in the CIA's employ, voluntarily informed the agency that he was a homosexual, he was discharged by the Director (petitioner's predecessor) under § 102(c). Respondent filed suit against petitioner in Federal District Court for declaratory and injunctive relief, alleging violations of the Administrative Procedure Act (APA), of his rights to property, liberty, and privacy under the First, Fourth, Fifth, and Ninth Amendments, and of his rights to procedural due process and equal protection of the laws under the Fifth Amendment. After the court granted respondent's motion for partial summary judgment on his APA claim, declining to address his constitutional claims, the Court of Appeals vacated the judgment and remanded. The court agreed with the District Court that judicial review under the APA of petitioner's termination decisions made under § 102(c) of the NSA was not precluded by the provision of the APA, 5 U. S. C. § 701(a), which renders that Act inapplicable whenever "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." However, the court held that the District Court had erred in its ruling on the merits.

Held:

1. Title 5 U. S. C. § 701(a)(2) precludes judicial review under the APA of the CIA Director's termination decisions under § 102(c) of the NSA. Section 701(a)(2) applies where a statute is drawn in such broad terms that in a given case there is no law to apply, and the court would have no meaningful standard against which to judge the agency's exercise of discretion. In allowing termination whenever the Director "shall *deem* [it] necessary or advisable," and not simply when the dismissal *is* necessary or advisable, § 102(c) fairly exudes deference to the Director, and forecloses the application of any meaningful judicial standard of review for assessing a termination decision short of permitting cross-examination of the Director. That § 102(c)'s implementation was "committed to agency

discretion by law" is also strongly suggested by the overall structure of the NSA, which vests in the Director very broad authority to protect intelligence sources and methods from unauthorized disclosure. Section 102(c) is an integral part of that structure, because the CIA's efficacy, and the Nation's security, depend in large measure on the reliability and trustworthiness of CIA employees. Pp. 599–601.

2. District Court review of respondent's constitutional claims is not precluded by § 102(c) of the NSA. Petitioner's view that all CIA employment termination decisions, even those based on policies normally repugnant to the Constitution, are given over to the Director's absolute discretion, is not supported by the required heightened showing of clear congressional intent. Although § 102(c) does commit termination decisions to the Director's discretion, 5 U. S. C. §§ 701(a)(1) and (a)(2) remove from judicial review only those determinations specifically identified by Congress or "committed to agency discretion by law." Nothing in § 102(c) demonstrates that Congress meant to preclude consideration of colorable constitutional claims arising out of the Director's actions pursuant to that section. Petitioner's contention that judicial review of constitutional claims will entail extensive "rummaging around" in the CIA's affairs to the detriment of national security is not persuasive, since claims attacking the CIA's employment policies under Title VII of the Civil Rights Act of 1964 are routinely entertained in federal court, and the District Court has the latitude to control any discovery process in order to balance respondent's need for access to proof against the CIA's extraordinary need for confidentiality. Petitioner's contention that Congress, in the interest of national security, may deny the courts authority to decide respondent's colorable constitutional claims arising out of his discharge and to order his reinstatement if the claims are upheld is also without merit, since Congress did not mean to impose such restrictions when it enacted § 102(c). Even without such prohibitory legislation, traditional equitable principles requiring the balancing of public and private interests control the grant of declaratory or injunctive relief, and, on remand, the District Court should thus address respondent's constitutional claims and the propriety of the equitable remedies sought. Pp. 601–605.

254 U. S. App. D. C. 282, 796 F. 2d 1508, affirmed in part, reversed in part, and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined, and in Parts I and II of which O'CONNOR, J., joined. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, *post*, p. 605. SCALIA, J., filed a dissenting opinion, *post*, p. 606. KENNEDY, J., took no part in the consideration or decision of the case.

Solicitor General Fried argued the cause for petitioner. With him on the briefs were *Assistant Attorney General Willard*, *Deputy Solicitor General Ayer*, *Paul J. Larkin, Jr.*, *Barbara L. Herwig*, *Barbara C. Biddle*, *David P. Doherty*, and *R. Bruce Burke*.

Mark H. Lynch argued the cause for respondent. With him on the brief were *William H. Allen*, *Elliott Schulder*, *John A. Powell*, *Helen Hershkoff*, and *Steven R. Shapiro*.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Section 102(c) of the National Security Act of 1947, 61 Stat. 498, as amended, provides that:

> "[T]he Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States . . . ." 50 U. S. C. § 403(c).

In this case we decide whether, and to what extent, the termination decisions of the Director under § 102(c) are judicially reviewable.

I

Respondent John Doe was first employed by the Central Intelligence Agency (CIA or Agency) in 1973 as a clerk-typist. He received periodic fitness reports that consistently rated him as an excellent or outstanding employee. By 1977, respondent had been promoted to a position as a covert electronics technician.

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[*] Randall Glenn Wick, *Susan D. McGreivy*, *Matthew Coles*, and *Mary C. Dunlap* filed a brief for the National Organization of Gay and Lesbian Scientists and Technical Professionals et al. as *amici curiae* urging affirmance.

Jeffrey F. Liss, *Laura A. Foggan*, and *Nan D. Hunter* filed a brief for the Employment Law Center et al. as *amici curiae*.

In January 1982, respondent voluntarily informed a CIA security officer that he was a homosexual. Almost immediately, the Agency placed respondent on paid administrative leave pending an investigation of his sexual orientation and conduct. On February 12 and again on February 17, respondent was extensively questioned by a polygraph officer concerning his homosexuality and possible security violations. Respondent denied having sexual relations with any foreign nationals and maintained that he had not disclosed classified information to any of his sexual partners. After these interviews, the officer told respondent that the polygraph tests indicated that he had truthfully answered all questions. The polygraph officer then prepared a five-page summary of his interviews with respondent, to which respondent was allowed to attach a two-page addendum.

On April 14, 1982, a CIA security agent informed respondent that the Agency's Office of Security had determined that respondent's homosexuality posed a threat to security, but declined to explain the nature of the danger. Respondent was then asked to resign. When he refused to do so, the Office of Security recommended to the CIA Director (petitioner's predecessor) that respondent be dismissed. After reviewing respondent's records and the evaluations of his subordinates, the Director "deemed it necessary and advisable in the interests of the United States to terminate [respondent's] employment with this Agency pursuant to section 102(c) of the National Security Act . . . ."[1] Respondent was also advised that, while the CIA would give him a positive recommendation in any future job search, if he applied for a job requiring a security clearance the Agency would inform the prospective employer that it had concluded that respondent's homosexuality presented a security threat.

Respondent then filed an action against petitioner in the United States District Court for the District of Columbia.

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[1] See May 11, 1982, Letter from Deputy General Counsel of CIA to respondent's counsel, App. 37.

Respondent's amended complaint asserted a variety of statutory and constitutional claims against the Director.[2] Respondent alleged that the Director's decision to terminate his employment violated the Administrative Procedure Act (APA), 5 U. S. C. § 706, because it was arbitrary and capricious, represented an abuse of discretion, and was reached without observing the procedures required by law and CIA regulations.[3] He also complained that the Director's termination of his employment deprived him of constitutionally protected rights to property, liberty, and privacy in violation of the First, Fourth, Fifth, and Ninth Amendments. Finally, he asserted that his dismissal transgressed the procedural due process and equal protection of the laws guaranteed by the Fifth Amendment. Respondent requested a declaratory judgment that the Director had violated the APA and the Constitution, and asked the District Court for an injunction ordering petitioner to reinstate him to the position he held with the CIA prior to his dismissal. As an alternative remedy, he suggested that he be returned to paid administrative leave and that petitioner be ordered to reevaluate respondent's employment termination and provide a statement of the reasons for any adverse final determination. Respondent sought no monetary damages in his amended complaint.

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[2] See Amended Complaint, *id.*, at 5, 12–13.

[3] Title 5 U. S. C. § 706 provides in pertinent part:

"Scope of review

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law."

Petitioner moved to dismiss respondent's amended complaint on the ground that § 102(c) of the National Security Act (NSA) precludes judicial review of the Director's termination decisions under the provisions of the APA set forth in 5 U. S. C. §§ 701, 702, and 706 (1982 ed., Supp. IV). Section 702 provides judicial review to any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." The section further instructs that "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." The scope of judicial review under § 702, however, is circumscribed by § 706, see n. 3, *supra,* and its availability at all is predicated on satisfying the requirements of § 701, which provides:

> "(a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> "(1) statutes preclude judicial review; or
>
> "(2) agency action is committed to agency discretion by law."

The District Court denied petitioner's motion to dismiss, and granted respondent's motion for partial summary judgment. The court determined that the APA provided judicial review of petitioner's termination decisions made under § 102(c) of the NSA, and found that respondent had been unlawfully discharged because the CIA had not followed the procedures described in its own regulations. The District Court declined, however, to address respondent's constitutional claims. Respondent was ordered reinstated to administrative leave status, and the Agency was instructed to reconsider his case using procedures that would supply him with the reasons supporting any termination decision and provide him with an opportunity to respond.

A divided panel of the Court of Appeals for the District of Columbia Circuit vacated the District Court's judgment and remanded the case for further proceedings. The Court of Appeals first decided that judicial review under the APA of the Agency's decision to terminate respondent was not precluded by §§ 701(a)(1) or (a)(2). Turning to the merits, the Court of Appeals found that, while an agency must normally follow its own regulations, the CIA regulations cited by respondent do not limit the Director's discretion in making termination decisions. Moreover, the regulations themselves state that, with respect to terminations pursuant to § 102(c), the Director need not follow standard discharge procedures, but may direct that an employee "be separated immediately and without regard to any suggested procedural steps."[4] The majority thus concluded that the CIA regulations provide no independent source of procedural or substantive protection.

The Court of Appeals went on to hold that respondent must demonstrate that the Director's action was an arbitrary and capricious exercise of his power to discharge employees under § 102(c).[5] Because the record below was unclear on certain points critical to respondent's claim for relief, the Court of Appeals remanded the case to District Court for a determination of the reason for the Director's termination of respondent.[6] We granted certiorari to decide the question whether the Director's decision to discharge a CIA employee under § 102(c) of the NSA is judicially reviewable under the APA.

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[4] *Doe* v. *Casey*, 254 U. S. App. D. C. 282, 293, and n. 41, 796 F. 2d 1508, 1519, and n. 41 (1986) (citing CIA Regulation HR 20–27m).

[5] This "arbitrary and capricious" standard is derived from § 706(2)(A), see n. 3, *supra*.

[6] The dissenting judge argued that Congress intended to preclude such review in creating § 102(c), and that the decision to discharge an employee was committed by that section to Agency discretion. He concluded that

II

The APA's comprehensive provisions, set forth in 5 U. S. C. §§ 701–706 (1982 ed. and Supp. IV), allow any person "adversely affected or aggrieved" by agency action to obtain judicial review thereof, so long as the decision challenged represents a "final agency action for which there is no other adequate remedy in a court." Typically, a litigant will contest an action (or failure to act) by an agency on the ground that the agency has neglected to follow the statutory directives of Congress. Section 701(a), however, limits application of the entire APA to situations in which judicial review is not precluded by statute, see § 701(a)(1), and the agency action is not committed to agency discretion by law, see § 701(a)(2).

In *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402 (1971), this Court explained the distinction between §§ 701(a)(1) and (a)(2). Subsection (a)(1) is concerned with whether Congress expressed an intent to prohibit judicial review; subsection (a)(2) applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" 401 U. S., at 410 (citing S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

We further explained what it means for an action to be "committed to agency discretion by law" in *Heckler* v. *Chaney*, 470 U. S. 821 (1985). *Heckler* required the Court to determine whether the Food and Drug Administration's decision not to undertake an enforcement proceeding against the use of certain drugs in administering the death penalty was subject to judicial review. We noted that, under § 701(a)(2), even when Congress has not affirmatively precluded judi-

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neither the statutory nor constitutional claims arising from a § 102(c) discharge are judicially reviewable under the APA.

cial oversight, "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." 470 U. S., at 830. Since the statute conferring power on the Food and Drug Administration to prohibit the unlawful misbranding or misuse of drugs provided no substantive standards on which a court could base its review, we found that enforcement actions were committed to the complete discretion of the FDA to decide when and how they should be pursued.

Both *Overton Park* and *Heckler* emphasized that § 701 (a)(2) requires careful examination of the statute on which the claim of agency illegality is based (the Federal-Aid Highway Act of 1968 in *Overton Park* and the Federal Food, Drug, and Cosmetic Act in *Heckler*). In the present case, respondent's claims against the CIA arise from the Director's asserted violation of § 102(c) of the NSA. As an initial matter, it should be noted that § 102(c) allows termination of an Agency employee whenever the Director "shall *deem* such termination necessary or advisable in the interests of the United States" (emphasis added), not simply when the dismissal *is* necessary or advisable to those interests. This standard fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review. Short of permitting cross-examination of the Director concerning his views of the Nation's security and whether the discharged employee was inimical to those interests, we see no basis on which a reviewing court could properly assess an Agency termination decision. The language of § 102(c) thus strongly suggests that its implementation was "committed to agency discretion by law."

So too does the overall structure of the NSA. Passed shortly after the close of the Second World War, the NSA created the CIA and gave its Director the responsibility "for protecting intelligence sources and methods from unauthorized disclosure." See 50 U. S. C. § 403(d)(3); S. Rep. No. 239, 80th Cong., 1st Sess., 2 (1947); H. R. Rep. No. 961, 80th Cong., 1st Sess., 3–4 (1947). Section 102(c) is an integral part of that statute, because the Agency's efficacy, and the Nation's security, depend in large measure on the reliability and trustworthiness of the Agency's employees. As we recognized in *Snepp* v. *United States*, 444 U. S. 507, 510 (1980), employment with the CIA entails a high degree of trust that is perhaps unmatched in Government service.

This overriding need for ensuring integrity in the Agency led us to uphold the Director's use of § 102(d)(3) of the NSA to withhold the identities of protected intelligence sources in *CIA* v. *Sims*, 471 U. S. 159 (1985). In denying respondent's Freedom of Information Act requests in *Sims* to produce certain CIA records, we stated that "[t]he plain meaning of the statutory language, as well as the legislative history of the National Security Act, . . . indicates that Congress vested in the Director of Central Intelligence very broad authority to protect all sources of intelligence information from disclosure." *Id.*, at 168–169. Section 102(c), that portion of the NSA under consideration in the present case, is part and parcel of the entire Act, and likewise exhibits the Act's extraordinary deference to the Director in his decision to terminate individual employees.

We thus find that the language and structure of § 102(c) indicate that Congress meant to commit individual employee discharges to the Director's discretion, and that § 701(a)(2) accordingly precludes judicial review of these decisions under the APA. We reverse the Court of Appeals to the extent that it found such terminations reviewable by the courts.

III

In addition to his claim that the Director failed to abide by the statutory dictates of § 102(c), respondent also alleged a number of constitutional violations in his amended complaint. Respondent charged that petitioner's termination of his employment deprived him of property and liberty interests under the Due Process Clause of the Fifth Amendment, denied him equal protection of the laws, and unjustifiably burdened his right to privacy. Respondent asserts that he is entitled, under the APA, to judicial consideration of these claimed violations.[7]

We share the confusion of the Court of Appeals as to the precise nature of respondent's constitutional claims. It is difficult, if not impossible, to ascertain from the amended complaint whether respondent contends that his termination, based on *his* homosexuality, is constitutionally impermissible, or whether he asserts that a more pervasive discrimination policy exists in the CIA's employment practices regarding *all* homosexuals. This ambiguity in the amended complaint is no doubt attributable in part to the inconsistent explanations respondent received from the Agency itself regarding his termination. Prior to his discharge, respondent had been told by two CIA security officers that his homosexual activities themselves violated CIA regulations. In contrast, the Deputy General Counsel of the CIA later informed respondent that homosexuality was merely a security concern that did not inevitably result in termination, but instead was evaluated on a case-by-case basis.

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[7] We understand that petitioner concedes that the Agency's failure to follow its *own regulations* can be challenged under the APA as a violation of § 102(c). See Reply Brief for Appellant in No. 85-5291 (CADC), p. 18 (*Doe* v. *Casey*, 254 U. S. App. D. C. 282, 796 F. 2d 1508 (1986)); see also *Service* v. *Dulles*, 354 U. S. 363 (1957) (recognizing the right of federal courts to review an agency's actions to ensure that its own regulations have been followed); *Sampson* v. *Murray*, 415 U. S. 61, 71 (1974) (stating that "federal courts do have authority to review the claim of a discharged governmental employee that the agency effectuating the discharge has not followed administrative regulations"). The Court of Appeals, however, found that the CIA's own regulations plainly protect the discretion granted the Director by § 102(c), and that the regulations "provid[e] no independent source of procedural or substantive protections." *Doe* v. *Casey*, *supra*, at 294, 796 F. 2d, at 1520. Thus, since petitioner prevailed on this ground below and does not seek further review of the question here, we do not reach that issue.

Petitioner maintains that, no matter what the nature of respondent's constitutional claims, judicial review is precluded by the language and intent of § 102(c). In petitioner's view, all Agency employment termination decisions, even those based on policies normally repugnant to the Constitution, are given over to the absolute discretion of the Director, and are hence unreviewable under the APA. We do not think § 102(c) may be read to exclude review of constitutional claims. We emphasized in *Johnson* v. *Robison*, 415 U. S. 361 (1974), that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. *Id.*, at 373–374. In *Weinberger* v. *Salfi*, 422 U. S. 749 (1975), we reaffirmed that view. We require this heightened showing in part to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim. See *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 681, n. 12 (1986).

Our review of § 102(c) convinces us that it cannot bear the preclusive weight petitioner would have it support. As detailed above, the section does commit employment termination decisions to the Director's discretion, and precludes challenges to these decisions based upon the statutory language of § 102(c). A discharged employee thus cannot complain that his termination was not "necessary or advisable in the interests of the United States," since that assessment is the Director's alone. Subsections (a)(1) and (a)(2) of § 701, however, remove from judicial review only those determinations specifically identified by Congress or "committed to agency discretion by law." Nothing in § 102(c) persuades us that Congress meant to preclude consideration of colorable constitutional claims arising out of the actions of the Director pursuant to that section; we believe that a constitutional claim based on an individual discharge may be reviewed by the District Court.[8] We agree with the Court of Appeals that there must be further proceedings in the District Court on this issue.

Petitioner complains that judicial review even of constitutional claims will entail extensive "rummaging around" in the Agency's affairs to the detriment of national security. See Tr. of Oral Arg. 8–13. But petitioner acknowledges that Title VII claims attacking the hiring and promotion policies of the Agency are routinely entertained in federal court, see Reply Brief for Petitioner 13–14; Tr. of Oral Arg. 9, and the inquiry and discovery associated with those proceedings would seem to involve some of the same sort of rummaging. Furthermore, the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission. See *Kerr* v. *United States District Court*, 426 U. S. 394, 405 (1976); *United States* v. *Reynolds*, 345 U. S. 1 (1953).

Petitioner also contends that even if respondent has raised a colorable constitutional claim arising out of his discharge, Congress in the interest of national security may deny the courts the authority to decide the claim and to order respondent's reinstatement if the claim is upheld. For the reasons previously stated, we do not think Congress meant to impose such restrictions when it enacted § 102(c) of the NSA. Even without such prohibitory legislation from Congress, of course, traditional equitable principles requiring the balancing of public and private interests control the grant of declaratory or injunctive relief in the federal courts. *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305 (1982); *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329–330 (1944). On remand, the District Court should thus address respondent's constitutional claims and the propriety of the equitable remedies sought.

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[8] Petitioner asserts, see Brief for Petitioner 27–28, n. 23, that respondent fails to present a colorable constitutional claim when he asserts that there is a general CIA policy against employing homosexuals. Petitioner relies on our decision in *Bowers* v. *Hardwick*, 478 U. S. 186 (1986), to support this view. This question was not presented in the petition for certiorari, and we decline to consider it at this stage of the litigation.

The judgment of the Court of Appeals is affirmed in part, reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE O'CONNOR, concurring in part and dissenting in part.

I agree that the Administrative Procedure Act (APA) does not authorize judicial review of the employment decisions referred to in § 102(c) of the National Security Act of 1947. Because § 102(c) does not provide a meaningful standard for judicial review, such decisions are clearly "committed to agency discretion by law" within the meaning of the provision of the APA set forth in 5 U. S. C. § 701(a)(2). I do not understand the Court to say that the exception in § 701(a)(2) is necessarily or fully defined by reference to statutes "drawn in such broad terms that in a given case there is no law to apply." See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 410 (1971), quoted *ante*, at 599. Accordingly, I join Parts I and II of the Court's opinion.

I disagree, however, with the Court's conclusion that a constitutional claim challenging the validity of an employment decision covered by § 102(c) may nonetheless be brought in a federal district court. Whatever may be the exact scope of Congress' power to close the lower federal courts to constitutional claims in other contexts, I have no doubt about its authority to do so here. The functions performed by the Central Intelligence Agency and the Director of Central Intelligence lie at the core of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320 (1936). The authority of the Director of Central Intelligence to control access to sensitive national security information by discharging employees deemed to be untrustworthy flows primarily from this constitutional power of the President, and Congress may surely provide that the inferior federal courts are not used to infringe on the President's constitutional authority. See, *e. g.*, *Department of Navy* v. *Egan*, 484 U. S. 518, 526–530 (1988); *Totten* v. *United States*, 92 U. S. 105 (1876). Section 102(c) plainly indicates that Congress has done exactly that, and the Court points to nothing in the structure, purpose, or legislative history of the National Security Act that would suggest a different conclusion. Accordingly, I respectfully dissent from the Court's decision to allow this lawsuit to go forward.

JUSTICE SCALIA, dissenting.

I agree with the Court's apparent holding in Part II of its opinion, *ante*, at 600 and 601, that the Director's decision to terminate a CIA employee is "committed to agency discretion by law" within the meaning of 5 U. S. C. § 701(a)(2). But because I do not see how a decision can, either practically or legally, be both unreviewable and yet reviewable for constitutional defect, I regard Part III of the opinion as essentially undoing Part II. I therefore respectfully dissent from the judgment of the Court.

I

Before proceeding to address Part III of the Court's opinion, which I think to be in error, I must discuss one significant element of the analysis in Part II. Though I subscribe to most of that analysis, I disagree with the Court's description of what is required to come within subsection (a)(2) of § 701, which provides that judicial review is unavailable "to the extent that . . . agency action is committed to agency discretion by law."* The Court's discussion, *ante*, at 599–600, suggests that the Court of Appeals below was correct in holding that this provision is triggered only when there is "no law to apply." See *Doe* v. *Casey*, 254 U. S. App. D. C. 282, 291–293, 796 F. 2d. 1508, 1517–1519 (1986). But see *id.*, at 305–307, 796 F. 2d, at 1531–1533 (Buckley, J., dissenting). Our precedents amply show that "commit[ment] to agency discretion by law" includes, but is not limited to, situations in which there is "no law to apply."

The Court relies for its "no law to apply" formulation upon our discussion in *Heckler* v. *Chaney*, 470 U. S. 821 (1985)—which, however, did not apply that as the sole criterion of § 701(a)(2)'s applicability, but to the contrary discussed the subject action's "general unsuitability" for review, and adverted to "tradition, case law, and sound reasoning." 470 U. S., at 831. Moreover, the only supporting authority for the "no law to apply" test cited in *Chaney* was our observation in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402 (1971), that "[t]he legislative history of the Administrative Procedure Act indicates that [§ 701(a)(2)] is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)," *id.*, at 410. Perhaps *Overton Park* discussed only the "no law to apply" factor because that was the only basis for non-

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*Technically, this provision merely precludes judicial review under the judicial review provisions of the Administrative Procedure Act (APA), that is, under Chapter 7 of Title 5 of the United States Code. However, at least with respect to all entities that come within the Chapter's definition of "agency," see 5 U. S. C. § 701(b), if review is not available under the APA it is not available at all. Chapter 7 (originally enacted as § 10 of the APA) is an umbrella statute governing judicial review of all federal agency action. While a right to judicial review of agency action may be created by a separate statutory or constitutional provision, once created it becomes subject to the judicial review provisions of the APA unless *specifically* excluded, see 5 U. S. C. § 559. To my knowledge, no specific exclusion exists.

reviewability that was even arguably applicable. It surely could not have believed that factor to be exclusive, for that would contradict the very legislative history, both cited and quoted in the opinion, from which it had been derived, which read in full: "The basic exception of matters committed to agency discretion would apply even if not stated at the outset [of the judicial review Chapter]. If, *for example*, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review." S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945) (emphasis added).

The "no law to apply" test can account for the nonreviewability of certain issues, but falls far short of explaining the full scope of the areas from which the courts are excluded. For the fact is that there is no governmental decision that is not subject to a fair number of legal constraints precise enough to be susceptible of judicial application—beginning with the fundamental constraint that the decision must be taken in order to further a public purpose rather than a purely private interest; yet there are many governmental decisions that are not at all subject to judicial review. A United States Attorney's decision to prosecute, for example, will not be reviewed on the claim that it was prompted by personal animosity. Thus, "no law to apply" provides much less than the full answer to whether § 701(a)(2) applies.

The key to understanding the "committed to agency discretion *by law*" provision of § 701(a)(2) lies in contrasting it with the "*statutes* preclude judicial review" provision of § 701(a)(1). Why "statutes" for preclusion, but the much more general term "law" for commission to agency discretion? The answer is, as we implied in *Chaney*, that the latter was intended to refer to "the 'common law' of judicial review of agency action," 470 U. S., at 832—a body of jurisprudence that had marked out, with more or less precision, certain issues and certain areas that were beyond the range of judicial review. That jurisprudence included principles ranging from the "political question" doctrine, to sovereign immunity (including doctrines determining when a suit against an officer would be deemed to be a suit against the sovereign), to official immunity, to prudential limitations upon the courts' equitable powers, to what can be described no more precisely than a traditional respect for the functions of the other branches reflected in the statement in *Marbury* v. *Madison*, 1 Cranch 137, 170–171 (1803), that "[w]here the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation." See, *e. g.*, *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 110–114 (1948); *Switchmen* v. *National Mediation Board*, 320 U. S. 297, 301–306 (1943); *United States* v. *George S. Bush & Co.*, 310 U. S. 371, 379–380 (1940); *Reaves* v. *Ainsworth*, 219 U. S. 296, 306 (1911); *Confiscation Cases*, 7 Wall. 454, 457–459 (1869); *Martin* v. *Mott*, 12 Wheat. 19, 29–30 (1827). Only if all that "common law" were embraced within § 701 (a)(2) could it have been true that, as was generally understood, "[t]he intended result of [§ 701(a)] is to restate the existing law as to the area of reviewable agency action." Attorney General's Manual on the Administrative Procedure Act 94 (1947). Because that is the meaning of the provision, we have continued to take into account for purposes of determining reviewability, post-APA as before, not only the text and structure of the statute under which the agency acts, but such factors as whether the decision involves "a sensitive and inherently discretionary judgment call," *Department of Navy* v. *Egan*, 484 U. S. 518, 527 (1988), whether it is the sort of decision that has traditionally been nonreviewable, *ICC* v. *Locomotive Engineers*, 482 U. S. 270, 282 (1987); *Chaney*, *supra*, at 832, and whether review would have "disruptive practical consequences," see *Southern R. Co.* v. *Seaboard Allied Milling Corp.*, 442 U. S. 444, 457 (1979). This explains the seeming contradiction between § 701(a)(2)'s disallowance of review to the extent that action is "committed to agency discretion," and § 706's injunction that a court shall set aside agency action that constitutes "an abuse of discretion." Since, in the former provision, "committed to agency discretion by law" means "of the sort that is traditionally unreviewable," it operates to keep certain categories of agency action out of the courts; but when agency action is appropriately in the courts, abuse of discretion is of course grounds for reversal.

All this law, shaped over the course of centuries and still developing in its application to new contexts, cannot possibly be contained within the phrase "no law to apply." It is not surprising, then, that although the Court recites the test it does not really apply it. Like other opinions relying upon it, this one essentially announces the test, declares victory and moves on. It is not really true "'that a court would have no meaningful standard against which to judge the agency's exercise of discretion,'" *ante*, at 600, quoting *Chaney*, 470 U. S., at 830. The standard set forth in § 102(c) of the National Security Act of 1947, 50 U. S. C. § 403(c), "necessary or advisable in the interests of the United States," at least excludes dismissal out of personal vindictiveness, or because the Director wants to give the job to his cousin. Why, on the Court's theory, is respondent not entitled to assert the presence of such excesses, under the "abuse of discretion" standard of § 706?

If and when this Court does come to consider the reviewability of a dismissal such as the present one on the ground that it violated the agency's regulations—a question the Court avoids today, see *ante*, at 602, n. 7—the difference between the "no law to apply" test and what I consider the correct test will be crucial. Perhaps a dismissal in violation of the regulations can be reviewed, but not simply because the regulations provide a standard that makes review possible. Thus, I agree with the Court's holding in Part II of its opinion (though, as will soon appear, that holding seems to be undone by its holding in Part III), but on different reasoning.

II

Before taking the reader through the terrain of the Court's holding that respondent may assert constitutional claims in this suit, I would like to try to clear some of the underbrush, consisting primarily of the Court's ominous warning that "[a] 'serious constitutional question' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Ante*, at 603, quoting from *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 681, n. 12 (1986).

The first response to the Court's grave doubt about the constitutionality of denying all judicial review to a "colorable constitutional claim" is that the denial of all judicial review is not at issue here, but merely the denial of review in United States district courts. As to that, the law is, and has long been, clear. Article III, § 2, of the Constitution extends the judicial power to "all Cases . . . arising under this Constitution." But Article III, § 1, provides that the judicial power shall be vested "in one supreme Court, *and in such inferior Courts as the Congress may from time to time ordain and establish*" (emphasis added). We long ago held that the power not to create any lower federal courts at all includes the power to invest them with less than all of the judicial power.

> "The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein." *Sheldon* v. *Sill*, 8 How. 441, 449 (1850).

Thus, if there is any truth to the proposition that judicial cognizance of constitutional claims cannot be eliminated, it is, at most, that they cannot be eliminated from state courts, and from this Court's appellate jurisdiction over cases from state courts (or cases from federal courts, should there be any) involving such claims. Narrowly viewed, therefore, there is no shadow of a constitutional doubt that we are free to hold that the present suit, whether based on constitutional grounds or not, will not lie.

It can fairly be argued, however, that our interpretation of § 701(a)(2) indirectly implicates the constitutional question whether state courts can be deprived of jurisdiction, because if they cannot, then interpreting § 701(a)(2) to exclude relief here would impute to Congress the peculiar intent to let state courts review Federal Government action that it is unwilling to let federal district courts review—or, alternatively, the peculiar intent to let federal district courts review, upon removal from state courts pursuant to 28 U. S. C. § 1442(a)(1), claims that it is unwilling to let federal district courts review in original actions. I turn, then, to the substance of the Court's warning that judicial review of all "colorable constitutional claims" arising out of the respondent's dismissal may well be constitutionally required. What could possibly be the basis for this fear? Surely not some general principle that *all* constitutional violations must be remediable in the courts. The very text of the Constitution refutes that principle, since it provides that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members," Art. I, § 5, and that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place," Art. I, § 6. Claims concerning constitutional violations committed in these contexts—for example, the rather grave constitutional claim that an election has been stolen—cannot be addressed to the courts. See, *e. g.*, *Morgan* v. *United States*, 255 U. S. App. D. C. 231, 801 F. 2d 445 (1986). Even apart from the strict text of the Constitution, we have found some constitutional claims to be beyond judicial review because they involve "political questions." See, *e. g.*, *Coleman* v. *Miller*, 307 U. S. 433, 443–446 (1939); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, 281 U. S. 74, 79–80 (1930). The doctrine of sovereign immunity—not repealed by the Constitution, but to the contrary at least partly reaffirmed as to the States by the Eleventh Amendment—is a monument to the principle that some constitutional claims can go unheard. No one would suggest that, if Congress had not passed the Tucker Act, 28 U. S. C. § 1491(a)(1), the courts would be able to order disbursements from the Treasury to pay for property taken under lawful authority (and subsequently destroyed) without just compensation. See *Schillinger* v. *United States*, 155 U. S. 163, 166–169 (1894). And finally, the doctrine of equitable discretion, which permits a court to refuse relief, even where no relief at law is available, when that would unduly impair the public interest, does not stand aside simply because the basis for the relief is a constitutional claim. In sum, it is simply untenable that there must be a judicial remedy for every constitutional violation. Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do, and sometimes they are left to perform that oath unreviewed, as we always are.

Perhaps, then, the Court means to appeal to a more limited principle, that although there may be areas where judicial review of a constitutional claim will be denied, the scope of those areas is fixed by the Constitution and judicial tradition, and cannot be affected by *Congress*, through the enactment of a statute such as § 102(c). That would be a rather counterintuitive principle, especially since Congress has in reality been the principal determiner of the scope of review, for constitutional claims as well as all other claims, through its waiver of the pre-existing doctrine of sovereign immunity. On the merits of the point, however: It seems to me clear that courts would not entertain, for example, an action for backpay by a dismissed Secretary of State claiming that the reason he lost his Government job was that the President did not like his religious views—surely a colorable violation of the First Amendment. I am confident we would hold that the President's choice of his Secretary of State is a "political question." But what about a similar suit by the Deputy Secretary of State? Or one of the Under Secretaries? Or an Assistant Secretary? Or the head of the European Desk? Is there really a constitutional line that falls at some immutable point between one and another of these offices at which the principle of unreviewability cuts in, and which cannot be altered by congressional prescription? I think not. I think Congress can prescribe, at least within broad limits, that for certain jobs the dismissal decision will be unreviewable—that is, will be "committed to agency discretion by law."

Once it is acknowledged, as I think it must be, (1) that not all constitutional claims require a judicial remedy, and (2) that the identification of those that do not can, even if only within narrow limits, be determined by Congress, then it is clear that the "serious constitutional question" feared by the Court is an illusion. Indeed, it seems to me that if one is in a mood to worry about serious constitutional questions the one to worry about is not whether Congress can, by enacting § 102(c), give the President, through his Director of Central Intelligence, unreviewable discretion in firing the agents that he employs to gather military and foreign affairs intelligence, but rather whether Congress could constitutionally *permit* the courts to review all such decisions if it wanted to. We have acknowledged that the courts cannot intervene when there is "a textually demonstratable constitutional commitment of the issue to a coordinate political department." *Baker* v. *Carr*, 369 U. S. 186, 217 (1962). We have recognized "the insistence (evident from the number of Clauses devoted to the subject) with which the Constitution confers authority over the Army, Navy, and militia upon the political branches." *United States* v. *Stanley*, 483 U. S. 669, 682 (1987). We have also recognized "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress." *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320 (1936). And finally, we have acknowledged that "[i]t is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence." *Snepp* v. *United States*, 444 U. S. 507, 512, n. 7 (1980) *(per curiam)*. We have thus recognized that the "authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President *and exists quite apart from any explicit congressional grant.*" *Department of Navy* v. *Egan*, 484 U. S., at 527 (emphasis added).

I think it entirely beyond doubt that if Congress intended, by the APA in 5 U. S. C. § 701(a)(2), to exclude judicial review of the President's decision (through the Director of Central Intelligence) to dismiss an officer of the Central Intelligence Agency, that disposition would be constitutionally permissible.

III

I turn, then, to whether that executive action is, within the meaning of § 701(a)(2), "committed to agency discretion by law." My discussion of this point can be brief, because the answer is compellingly obvious. Section 102(c) of the National Security Act of 1947, 61 Stat. 498, states:

> "*Notwithstanding . . . the provisions of any other law*, the Director of Central Intelligence, *may, in his discretion*, terminate the employment of any officer or employee of the Agency *whenever he shall deem* such termination necessary or advisable in the interests of the

> United States . . . ." 50 U. S. C. § 403(c) (emphasis added).

Further, as the Court declares, § 102(c) is an "integral part" of the National Security Act, which throughout exhibits "extraordinary deference to the Director." *Ante*, at 601. Given this statutory text, and given (as discussed above) that the area to which the text pertains is one of predominant executive authority and of traditional judicial abstention, it is difficult to conceive of a statutory scheme that more clearly reflects that "commit[ment] to agency discretion by law" to which § 701(a)(2) refers.

It is baffling to observe that the Court seems to agree with the foregoing assessment, holding that "the language and structure of § 102(c) indicate that Congress meant to commit individual employee discharges to the Director's discretion." *Ibid.* Nevertheless, without explanation the Court reaches the conclusion that "a constitutional claim based on an individual discharge may be reviewed by the District Court." *Ante*, at 603–604. It seems to me the Court is attempting the impossible feat of having its cake and eating it too. The opinion states that "[a] discharged employee . . . cannot complain that his termination was not 'necessary or advisable in the interests of the United States,' *since that assessment is the Director's alone.*" *Ante*, at 603 (emphasis added). But two sentences later it says that "[n]othing in § 102(c) persuades us that Congress meant to preclude consideration of colorable constitutional claims arising out of the actions of the Director pursuant to that section." Which are we to believe? If the former, the case should be at an end. If the § 102(c) assessment is really "the Director's alone," the only conceivable basis for review of respondent's dismissal (which is what this case is about) would be that the dismissal was not *really* the result of a § 102(c) assessment by the Director. But respondent has never contended that, nor could he. Not only was his counsel formally advised, by letter of May 11, 1982, that "the Director has deemed it necessary and advisable in the interests of the United States to terminate your client's employment with this Agency pursuant to section 102(c)," App. 37, but the petitioner filed with the court an affidavit by the Director, dated September 17, 1982, stating that "[a]fter careful consideration of the matter, I determined that the termination of Mr. Doe's employment was necessary and advisable in the interests of the United States and, exercising my discretion under the authority granted by section 102(c) . . . I terminated Mr. Doe's employment." *Id.*, at 56. Even if the basis for the Director's assessment was the respondent's homosexuality, and even if the connection between that and the interests of the United States is an irrational and hence an unconstitutional one, if that assessment is really "the Director's alone" there is nothing more to litigate about. I cannot imagine what the Court expects the "further proceedings in the District Court" which it commands, *ante*, at 604, to consist of, unless perhaps an academic seminar on the relationship of homosexuality to security risk. For even were the District Court persuaded that no such relationship exists, "that assessment is the Director's alone."

Since the Court's disposition contradicts its fair assurances, I must assume that the § 102(c) judgment is no longer "the Director's alone," but rather only "the Director's alone except to the extent it is colorably claimed that his judgment is unconstitutional." I turn, then, to the question of where this exception comes from. As discussed at length earlier, the Constitution assuredly does not require it. Nor does the text of the statute. True, it only gives the Director absolute discretion to dismiss "[n]otwithstanding . . . the provisions of any other *law*" (emphasis added). But one would hardly have expected it to say "[n]otwithstanding the provisions of any other law *or of the Constitution.*" What the provision directly addresses is the authority to dismiss, not the authority of the courts to review the dismissal. And the Director does *not* have the authority to dismiss in violation of the Constitution, nor could Congress give it to him. The implication of nonreviewability in this text, its manifestation that the action is meant to be "committed to agency discretion," is no weaker with regard to constitutional claims than nonconstitutional claims, unless one accepts the unacceptable proposition that the only basis for such committal is "no law to apply."

Perhaps, then, a constitutional right is by its nature so much more important to the claimant than a statutory right that a statute which plainly excludes the latter should not be read to exclude the former unless it says so. That principle has never been announced—and with good reason, because its premise is not true. An individual's contention that the Government has reneged upon a $100,000 debt owing under a contract is much more important to him—both financially and, I suspect, in the sense of injustice that he feels—than the same individual's claim that a particular federal licensing provision requiring a $100 license denies him equal protection of the laws, or that a particular state tax violates the Commerce Clause. A citizen would much rather have his statutory entitlement correctly acknowledged after a constitutionally inadequate hearing, than have it incorrectly denied after a proceeding that fulfills all the requirements of the Due Process Clause. The *only* respect in which a constitutional claim is necessarily more significant than any other kind of claim is that, regardless of how trivial its real-life importance may be in the case at hand, it can be asserted against the action of the legislature itself, whereas a nonconstitutional claim (no matter how significant) cannot. That is an important distinction, and one relevant to the constitutional analysis that I conducted above. But it has no relevance to the question whether, as between executive violations of statute and executive violations of the Constitution—both of which are equally unlawful, and neither of which can be said, *a priori*, to be more harmful or more unfair to the plaintiff—one or the other category should be favored by a presumption against exclusion of judicial review.

Even if we were to assume, however, contrary to all reason, that every constitutional claim is *ipso facto* more worthy, and every statutory claim less worthy, of judicial review, there would be no basis for writing that preference into a statute that makes no distinction between the two. We have rejected such judicial rewriting of legislation even in the more appealing situation where particular applications of a statute are not merely less desirable but in fact raise "grave constitutional doubts." That, we have said, only permits us to adopt one rather than another permissible reading of the statute, but not, by altering its terms, "to ignore the legislative will in order to avoid constitutional adjudication." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 841 (1986). There is no more textual basis for reading this statute as barring only nonconstitutional claims than there is to read it as barring only claims with a monetary worth of less than $1 million. Neither of the two decisions cited by the Court to sustain its power to read in a limitation for constitutional claims remotely supports that proposition. In *Johnson* v. *Robison*, 415 U. S. 361 (1974), we considered a statute precluding judicial review of "'the *decisions* of the Administrator on any question of law or fact *under* any law administered by the Veterans' Administration.'" *Id.*, at 367 (quoting 38 U. S. C. § 211(a)). We concluded that this statute did not bar judicial review of a challenge to the constitutionality of the statute itself, since that was a challenge not to a decision of the Administrator but to a decision of Congress. Our holding was based upon the text, and not upon some judicial power to read in a "constitutional claims" exception. And in *Weinberger* v. *Salfi*, 422 U. S. 749 (1975), we held that 42 U. S. C. § 405(h), a statute depriving district courts of federal-question jurisdiction over "any claim arising under" Title II of the Social Security Act, *did* embrace even constitutional challenges, since its language was "quite different" from that at issue in *Johnson*, and "extend[ed] to any 'action' seeking 'to recover on any [Social Security] claim'—

irrespective of whether resort to judicial processes is necessitated by . . . allegedly unconstitutional statutory restrictions." 422 U. S., at 762. In *Salfi*, to be sure, another statutory provision was available that would enable judicial review of the constitutional claim, but as just observed, that distinction does not justify drawing a line that has no basis in the statute. *Commodity Futures Trading Comm'n* v. *Schor*, *supra*.

The Court seeks to downplay the harm produced by today's decision by observing that "petitioner acknowledges that Title VII claims attacking the hiring and promotion policies of the Agency are routinely entertained in federal court." *Ante*, at 604, citing Reply Brief for Petitioner 13–14; Tr. of Oral Arg. 9. Assuming that those suits are statutorily authorized, I am willing to accept the Director's assertion that, while suits regarding hiring or promotion are tolerable, a suit regarding dismissal is not. Like the Court, I have no basis of knowledge on which I could deny that—especially since it is obvious that if the Director thinks that a particular hiring or promotion suit is genuinely contrary to the interests of the United States he can simply make the hiring or grant the promotion, and then dismiss the prospective litigant under § 102(c).

The harm done by today's decision is that, contrary to what Congress knows is preferable, it brings a significant decisionmaking process of our intelligence services into a forum where it does not belong. Neither the Constitution, nor our laws, nor common sense gives an individual a right to come into court to litigate the reasons for his dismissal as an intelligence agent. It is of course not just *valid* constitutional claims that today's decision makes the basis for judicial review of the Director's action, but all *colorable* constitutional claims, whether meritorious or not. And in determining whether what is colorable is in fact meritorious, a court will necessarily have to review the entire decision. If the Director denies, for example, respondent's contention in the present case that he was dismissed because he was a homosexual, how can a court possibly resolve the dispute without knowing what other good, intelligence-related reasons there might have been? I do not see how any "latitude to control any discovery process," *ante*, at 604, could justify the refusal to permit such an inquiry, at least *in camera*. Presumably the court would be expected to evaluate whether the agent really did fail in this or that secret mission. The documents needed will make interesting reading for district judges (and perhaps others) throughout the country. Of course the Agency can seek to protect itself, ultimately, by an authorized assertion of executive privilege, *United States* v. *Nixon*, 418 U. S. 683 (1974), but that is a power to be invoked only *in extremis*, and any scheme of judicial review of which it is a central feature is extreme. I would, in any event, not like to be the agent who has to explain to the intelligence services of other nations, with which we sometimes cooperate, that they need have no worry that the secret information they give us will be subjected to the notoriously broad discovery powers of our courts, because, although we have to litigate the dismissal of our spies, we have available a protection of somewhat uncertain scope known as executive privilege, which the President can invoke if he is willing to take the political damage that it often entails.

Today's result, however, will have ramifications far beyond creation of the world's only secret intelligence agency that must litigate the dismissal of its agents. If constitutional claims can be raised in this highly sensitive context, it is hard to imagine where they cannot. The assumption that there are any executive decisions that cannot be hauled into the courts may no longer be valid. Also obsolete may be the assumption that we are capable of preserving a sensible common law of judicial review.

I respectfully dissent.

PINTER ET AL. *v.* DAHL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86-805. Argued December 9, 1987—Decided June 15, 1988

Petitioner Pinter, an oil and gas producer and registered securities dealer, sold unregistered securities consisting of fractional undivided interests in oil and gas leases to respondent Dahl, a real estate broker and investor who was experienced in oil and gas ventures. Dahl touted the venture to the other respondents—his friends, family, and business associates—and assisted them in completing subscription agreement forms prepared by Pinter, but received no commission from Pinter when each of them invested in unregistered interests on the basis of Dahl's involvement. When the venture failed, respondents sued Pinter in Federal District Court, seeking rescission under § 12(1) of the Securities Act of 1933 (Act) for the unlawful sale of unregistered securities. After a bench trial, the court granted judgment for respondents, apparently rejecting Pinter's common-law *in pari delicto* defense to Dahl's suit. The Court of Appeals affirmed, ruling that such defense was not available because § 12(1) creates a "strict liability offense" rather than liability based on intentional conduct, and distinguishing *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U. S. 299, which held that the defense applies in actions under § 10(b) of the Securities Exchange Act of 1934, on the ground that § 10(b) contains an element of scienter. The court also held that Dahl was not a "seller" within the meaning of § 12(1) and therefore could not be held liable in contribution for the other respondents' claims against Pinter, since, although Dahl's conduct was a "substantial factor" in causing the other respondents' purchases, there was no evidence that he had sought or received financial benefit for himself or anyone other than the other respondents.

Held:

1. The *in pari delicto* defense is available in a § 12(1) private rescission action. Pp. 632-641.

(a) *Bateman Eichler* is not limited to § 10(b) claims, to cases involving willful or negligent misconduct, or to implied, as opposed to express, private causes of action. Rather, the decision provides the appropriate test for allowance of the *in pari delicto* defense in a private action under any of the federal securities laws, including a § 12(1) rescission suit. Pp. 633-635.

(b) The first prong of the *Bateman Eichler* test is satisfied in the § 12(1) context if the plaintiff is at least equally responsible for the issuer's illegal failure to register the securities or to conduct the sale in a manner that satisfies the Act's registration exemption provisions. A purchaser's knowledge that the securities are unregistered cannot, by itself, constitute equal culpability, even where he is a sophisticated buyer who may not necessarily need the Act's protection. Rather, the relative responsibility assessment turns upon the facts of each case. The second prong of the *Bateman Eichler* test is satisfied in the § 12(1) context where the plaintiff's role is primarily as a promoter rather than as an investor. The determination depends on a host of readily accessible factors, including, but not limited to, the extent of the plaintiff's financial involvement compared to that of the third parties he solicited, the incidental nature of his promotional activities, the benefits he received for those activities, and the extent of his involvement in the offering's planning stages. Pp. 635–639.

(c) The District Court's findings are inadequate to determine whether Dahl may be subjected to Pinter's *in pari delicto* defense under the *Bateman Eichler* test, as it applies to § 12(1) actions. Pp. 639–641.

2. A nonowner of securities must solicit the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner, in order to qualify as a "seller" within the meaning of § 12(1), which provides that "[a]ny person who . . . offers or sells a security" in violation of the Act's registration requirement "shall be liable to the person purchasing such security from him." Pp. 641–655.

(a) Section 12(1)'s language and history, as well as the statutory purpose of protecting investors, demonstrate that "seller" is not limited to an owner who passes title, or other interest in a security, to the buyer for value, but extends to a broker or other person who successfully solicits a purchase of securities, so long as he is motivated at least in part by a desire to serve his own financial interests or those of the securities owner. It strains the meaning of § 2(3) of the Act, which defines "offer" for § 12(1)'s purposes as including every "solicitation of an offer to buy . . . for value," to say that a person who gratuitously urges another, even strongly or enthusiastically, to make a securities purchase solely for the buyer's benefit is "soliciting" or is requesting value in exchange for his suggestion or seeking the value the titleholder will obtain in exchange for the ultimate sale. Only if the soliciting person is motivated by such a financial interest can it be fairly said that the buyer "purchased" the security from him, such that he can be aligned with the owner in a rescission action. Pp. 642–647.

(b) The language, history, and statutory context of § 12(1) demonstrate that the "substantial factor" test, whereby a nontransferor seller is defined as one whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place, is not an appropriate standard for assessing § 12(1) liability as a statutory seller. Without affording guidelines for determining when the defendant's conduct is sufficiently integral to the sale, the test would expand primary § 12(1) liability beyond persons who pass title and those who "offer" or "solicit" offers for financial gain to persons who merely participate in unlawful sales transactions but are only remotely related to the relevant aspects of the transactions, including accountants and lawyers simply performing their professional services. Such persons do not even arguably fit within the definitions set out in § 2(3). Congress did not intend such a gross departure from the statutory language. Pp. 648–654.

(c) The record is insufficient to determine whether Dahl may be liable as a statutory "seller" under § 12(1). The District Court's finding that Dahl solicited the other respondents' purchases is not clearly erroneous. However, the Court of Appeals' apparent conclusion that Dahl was motivated entirely by a gratuitous desire to share an attractive investment opportunity with his friends and associates was premature, since the District Court made no findings that focused on whether he urged the other respondents' purchases in order to further some financial interest of his own or of Pinter. Pp. 654–655.

787 F. 2d 985, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 655. KENNEDY, J., took no part in the consideration or decision of the case.

Braden W. Sparks argued the cause and filed briefs for petitioners. *Richard G. Taranto* argued the cause for the Securities and Exchange Commission as *amicus curiae* in support of petitioners. With him on the brief were *Solicitor General Fried, Deputy Solicitor General Cohen, Daniel L. Goelzer, Paul Gonson, Jacob H. Stillman,* and *Max Berueffy.*

John A. Spinuzzi argued the cause for respondents. With him on the brief was *Michael F. Linz.*

JUSTICE BLACKMUN delivered the opinion of the Court.

The questions presented by this case are (a) whether the common-law *in pari delicto* defense is available in a private action brought under § 12(1) of the Securities Act of 1933 (Securities Act), 48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.*, for the rescission of the sale of unregistered securities, and (b) whether one must intend to confer a benefit on himself or on a third party in order to qualify as a "seller" within the meaning of § 12(1).

I

The controversy arises out of the sale prior to 1982 of unregistered securities (fractional undivided interests in oil and gas leases) by petitioner Billy J. "B. J." Pinter to respondents Maurice Dahl and Dahl's friends, family, and business associates.[1] Pinter is an oil and gas producer in Texas and Oklahoma, and a registered securities dealer in Texas. Dahl is a California real estate broker and investor, who, at the time of his dealings with Pinter, was a veteran of two unsuccessful oil and gas ventures. In pursuit of further investment opportunities, Dahl employed an oil field expert to locate and acquire oil and gas leases. This expert introduced Dahl to Pinter. Dahl advanced $20,000 to Pinter to acquire leases, with the understanding that they would be held in the name of Pinter's Black Gold Oil Company and that Dahl would have a right of first refusal to drill certain wells on the leasehold properties. Pinter located leases in Oklahoma, and Dahl toured the properties, often without Pinter, in order to talk to others and "get a feel for the properties." App. to Pet.

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[1] Petitioners are Pinter, individually and d.b.a. Black Gold Oil Company, Pinter Energy Company, and Pinter Oil Company. Throughout this opinion, we often refer to petitioners collectively as "Pinter."

Respondents are Maurice Dahl, Gary Clark, W. Grantham, Robert J. Daniele, Charles Dahl, Dowayne C. Bockman, Ray Dilbeck, Richard Koon, Art Overgaard, Jack Yeager, Accra Tronics Seals Corp., and Aaron Heller. These are Dahl's brother, his accountant, his partner in a construction business, the bank officer handling his construction loans, his construction-business insurance agent, a business owned by a longtime friend, and other business associates and friends of Maurice Dahl. See App. 101–104.

for Cert. 32. Upon examining the geology, drilling logs, and production history assembled by Pinter, Dahl concluded, in the words of the District Court, that "there was no way to lose." *Ibid.*

After investing approximately $310,000 in the properties, Dahl told the other respondents about the venture. Except for Dahl and respondent Grantham, none of the respondents spoke to or met Pinter or toured the properties. Because of Dahl's involvement in the venture, each of the other respondents decided to invest about $7,500.[2]

Dahl assisted his fellow investors in completing the subscription-agreement form prepared by Pinter. Each letter-contract signed by the purchaser stated that the participating interests were being sold without the benefit of registration under the Securities Act, in reliance on Securities and Exchange Commission (SEC or Commission) Rule 146, 17 CFR § 230.146 (1982).[3] In fact, the oil and gas interests involved in this suit were never registered with the Commission. Respondents' investment checks were made payable to Black Gold Oil Company. Dahl received no commission from Pinter in connection with the other respondents' purchases.

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[2] The venture included still others who were either interested in additional ventures organized by Pinter or were new investors who met Pinter through sources other than Dahl. Those investors are not parties to this litigation.

[3] Specifically, each document recited:

"WHEREAS the parties constitute a predetermined and limited group of sophisticated and knowledgeable well informed investors who desire to arrange for participation in an oil and/or gas drilling venture as an investment and do declare that it is not for the purpose of reselling their interest therein. (These participating interests are being sold without the benefit of registration under the Securities Act of 1933, as amended, and on reliance of rule 146 thereunder)." App. 95.

See also n. 4, *infra*.

Rule 146 was rescinded, effective June 30, 1982, by SEC Release No. 33-6389, 47 Fed. Reg. 11251 (1982), and superseded by provisions of Regulation D, 17 CFR, p. 425 (1987).

When the venture failed and their interests proved to be worthless, respondents brought suit against Pinter in the United States District Court for the Northern District of Texas, seeking rescission under § 12(1) of the Securities Act, 15 U. S. C. § 77*l*(1), for the unlawful sale of unregistered securities.[4]

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[4] Section 12 provides:

"Any person who—(1) offers or sells a security in violation of section [5] . . . shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

Section 5, 15 U. S. C. § 77e, referred to in § 12, states, in pertinent part, that if a security is unregistered, it is unlawful for a person to sell or deliver the security in interstate commerce.

A number of exemptions, however, enable an issuer to avoid the registration requirement of the Securities Act. One of these, § 4(2), 15 U. S. C. § 77d(2), commonly referred to as the "private-offering" exemption, relieves from registration "transactions by an issuer not involving any public offering." See *SEC* v. *Ralston Purina Co.*, 346 U. S. 119 (1953) (establishing criteria for determining whether an offering fits the private-offering exemption).

In 1974, the Commission sought to provide "objective standards" under § 4(2) by adopting Rule 146. Rule 146—Transactions by an Issuer Deemed Not to Involve Any Public Offering, Securities Act Rel. No. 33-5487 (effective June 10, 1974), 39 Fed. Reg. 15261 (1974), CCH Fed. Sec. L. Rep. ¶ 2710, p. 2902. It has been said that the Rule, which is now superseded by provisions of Regulation D, see n. 3, *supra*, provided that a transaction by an issuer would not be deemed to involve a public offering within the meaning of § 4(2) if it was part of an offering that met the following conditions:

"[T]he offering must 1) not be made by any means or form of general solicitation or advertising; 2) be made only to those persons whom the issuer has reasonable grounds to believe are of knowledge and experience which would enable them to evaluate the merits of the issue or who are financially able to bear the risk; 3) be made only to those persons who have access to the same kind of information as would be contained in a registration statement. Under this rule, the issuer must have reasonable grounds to believe, and must believe, that there are no more than thirty-five purchasers

In a counterclaim, Pinter alleged that Dahl, by means of fraudulent misrepresentations and concealment of facts, induced Pinter to sell and deliver the securities. Pinter averred that Dahl falsely assured Pinter that he would provide other qualified, sophisticated, and knowledgeable investors with all the information necessary for evaluation of the investment. Dahl allegedly agreed to raise the funds for the venture from those investors, with the understanding that Pinter would simply be the "operator" of the wells. App. 69–73.[5] Pinter also asserted, on the basis of the same factual allegations, that Dahl's suit was barred by the equitable defenses of estoppel and *in pari delicto*. *Id.*, at 66–67.[6]

The District Court, after a bench trial, granted judgment for respondent-investors. *Id.*, at 92. The court concluded that Pinter had not proved that the oil and gas interests were entitled to the private-offering exemption from registration. App. to Pet. for Cert. a–37. Accordingly, the court ruled

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from the issuer." *Mary S. Krech Trust* v. *Lakes Apartments*, 642 F. 2d 98, 101 (CA5 1981).

See 3 H. Bloomenthal, Securities and Federal Corporate Law § 4.05[2] (1981 ed.). Pinter sought to take advantage of this "safe harbor" in issuing the oil and gas interests involved in this case.

In addition to their § 12(1) claim, respondents alleged that Pinter made material misrepresentations regarding the oil and gas properties and his oil experience, thereby entitling them to damages under § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j(b), and SEC Rule 10b–5 thereunder, 17 CFR § 240.10b–5 (1987), and to rescission under § 12(2) of the Securities Act, 15 U. S. C. § 77*l*(2). Respondents also asserted pendent claims under Texas and California law. None of these additional claims is before us.

[5] Pinter apparently meant to contend that Dahl was responsible for the loss of the private-offering exemption from registration under § 4(2) and Rule 146, see n. 4, *supra*, although Pinter did not make this assertion explicit in his pleadings. Cf. Second Amended Proposed Findings of Fact and Conclusions of Law of Defendants Billy J. "B. J." Pinter, et al., App. 85–86 (claiming that petitioners had met the requirements of the private-offering exemption).

[6] Pinter contended that all the respondents should be estopped from recovery because of Dahl's fraudulent conduct. He asserted his *in pari delicto* defense solely against Dahl.

that, because the securities were unregistered, respondents were entitled to rescission pursuant to § 12(1). *Ibid.*[7] The court also concluded that the evidence was insufficient to sustain Pinter's counterclaim against Dahl. The District Court made no mention of the equitable defenses asserted by Pinter, but it apparently rejected them.

A divided panel of the Court of Appeals for the Fifth Circuit affirmed. 787 F. 2d 985 (1986). The court first held that Dahl's involvement in the sales to the other respondents did not give Pinter an *in pari delicto* defense to Dahl's recovery. *Id.*, at 988.[8] The court concluded that the defense is not available in an action under § 12(1) because that section creates "a strict liability offense" rather than liability based on intentional misconduct. It thereby distinguished our recent decision in *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U. S. 299 (1985), where we held that the *in pari delicto* defense is applicable in an action under § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j(b), which contains an element of scienter. Noting that Dahl was "as 'culpable' as Pinter in the sense that his conduct was an equal producing cause of the illegal transaction," the court nevertheless held that "[a]bsent a showing that Dahl's conduct was 'offensive to the dictates of natural justice,'" the *in pari delicto* defense was not available. 787 F. 2d, at 988, quoting *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240, 245 (1933).

The Court of Appeals next considered whether Dahl was himself a "seller" of the oil and gas interests within the meaning of § 12(1), for if he was, the court assumed, he could be held liable in contribution for the other plaintiffs' claims against Pinter.[9] 787 F. 2d, at 990, and n. 8. Citing Fifth Circuit precedent, the court described a statutory seller as "(1) one who parts with title to securities in exchange for consideration or (2) one whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place." *Id.*, at 990. While acknowledging that Dahl's conduct was a "substantial factor" in causing the other plaintiffs to purchase securities from Pinter, the court declined to hold that Dahl was a "seller" for purposes of § 12(1). Instead, the court went on to refine its test to include a threshold requirement that one who acts as a "promoter" be "motivated by a desire to confer a direct or indirect benefit on someone other than the person he has advised to purchase." 787 F. 2d, at 991. The court reasoned that "a rule imposing liability (without fault or knowledge) on friends and family members who give one another gratuitous advice on investment matters unreasonably interferes with well-established patterns of social discourse." *Ibid.* Accordingly, since the court found no evidence that Dahl sought or received any financial benefit in return for his advice, it declined to impose liability on Dahl for "mere gregariousness." *Ibid.*

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[7] Having reached this conclusion, the District Court found it unnecessary to consider respondents' § 12(2) claim. App. to Pet. for Cert. 37–38. The court rejected respondents' claim under § 10(b) and Rule 10b–5. App. to Pet. for Cert. a–37.

[8] The court also rejected Pinter's estoppel defense. 787 F. 2d, at 988–989. That holding is not challenged in this Court. We express no view as to whether this equitable defense is available in a § 12(1) action.

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[9] Because none of the other plaintiffs sought recovery from Dahl, Dahl's liability on their claims is at issue only if contribution is available to Pinter.

The Court of Appeals addressed Pinter's contention that Dahl was liable as a § 12(1) seller and thus should be accountable to Pinter in contribution for the amounts awarded to the other plaintiffs. 787 F. 2d, at 987. It is not entirely clear how this claim was raised below. Pinter's pleadings do not state an explicit cause of action for contribution against Dahl, although Pinter did move, albeit unsuccessfully, to realign Dahl as a third-party defendant, based on Pinter's assertion that Dahl was a "seller" of the unregistered securities to the remaining plaintiffs and had made the allegedly actionable misrepresentations to them in connection with the sales. See 1 Record 164–165, 189. Presumably, the Court of Appeals construed Pinter's affirmative defense for contributory fault and his incorporation of this defense into his counterclaims, as effectively seeking contribution.

Unlike § 11 of the Securities Act, see 15 U. S. C. § 77k(f), § 12 does not expressly provide for contribution. The Court of Appeals did not reach the question whether Pinter is entitled to contribution under § 12(1) because it found that Dahl was not a seller for purposes of § 12(1), and therefore would not be the proper subject of a contribution claim. The parties have not raised or addressed the contribution issue before this Court, and we express no view as to whether a right of contribution exists under § 12(1).

The dissenting judge took issue with the majority's analysis on both points. First, assuming that this Court's decision in *Bateman Eichler* applied to all securities cases, the dissent concluded that Dahl's suit should be barred by the *in pari delicto* doctrine because Dahl was a "catalyst" for the entire transaction and knew that the securities were unregistered. 787 F. 2d, at 991. In addition, the dissent maintained that Dahl's conduct transformed him into a "seller" of unregistered securities to the other plaintiffs under the Fifth Circuit's established "substantial factor" test. *Id.*, at 991-992. It added that, even under the majority's expectation-of-financial-benefit refinement, Dahl's promotional activities rendered him a "seller" because "[m]ore investors means that the investment program receives the requisite amount of financing at a smaller risk to each investor." *Id.*, at 992, n. 3.[10]

The Court of Appeals, by an 8-to-6 vote, denied rehearing en banc. 794 F. 2d 1016 (1986). The judges who dissented from that denial asserted that the panel majority's addition of the financial-benefit requirement to the definition of a "seller," "has absolutely no foundation in either settled securities law or its underlying policies." *Id.*, at 1017. They also criticized the panel majority for misinterpreting *Bateman Eichler* to limit application of the *in pari delicto* doctrine to fraud actions under § 10(b). 794 F. 2d, at 1017.

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[10] The dissent addressed the "seller" issue in the context of Pinter's asserted *in pari delicto* defense. In its view, Dahl's role as a seller of the unregistered securities "put him in the same boat as Pinter," making him vulnerable to that defense. 787 F. 2d, at 991. The dissent also indicated that it "would go further" and hold that "Pinter is entitled to contribution from Dahl since Dahl is at least equally culpable for the sale to the other plaintiffs." *Id.*, at 995, n. 5.

Because of the importance of the issues involved to the administration of the federal securities laws, we granted certiorari. 481 U. S. 1012 (1987).

II

The equitable defense of *in pari delicto*, which literally means "in equal fault," is rooted in the common-law notion that a plaintiff's recovery may be barred by his own wrongful conduct. See *Bateman Eichler*, 472 U. S., at 306, and nn. 12 and 13. Traditionally, the defense was limited to situations where the plaintiff bore "at least substantially equal responsibility for his injury," *id.*, at 307, and where the parties' culpability arose out of the same illegal act. 1 J. Story, Equity Jurisprudence 399–400 (14th ed. 1918). Contemporary courts have expanded the defense's application to situations more closely analogous to those encompassed by the "unclean hands" doctrine, where the plaintiff has participated "in some of the same sort of wrongdoing" as the defendant. See *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 138 (1968). In *Perma Life*, however, the Court concluded that this broadened construction is not appropriate in litigation arising under federal regulatory statutes. *Ibid.* Nevertheless, in separate opinions, five Justices recognized that a narrow, more traditional formulation should be available in private actions under the antitrust laws. See *id.*, at 145 (WHITE, J., concurring); *id.*, at 147–148 (Fortas, J., concurring in result); *id.*, at 148–149, 151 (MARSHALL, J., concurring in result); *id.*, at 154–155 (Harlan, J., joined by Stewart, J., concurring in part and dissenting in part).

In *Bateman Eichler*, the Court addressed the scope of the *in pari delicto* defense in the context of an action brought by securities investors under the antifraud provisions of § 10(b) and Rule 10b–5, alleging that the broker-dealer and corporate insider defendants had induced the plaintiffs to purchase large quantities of stock by divulging false and materially incomplete information on the pretext that it was accurate inside information. The defendants argued that the scope should be broader where the private cause of action is implied, as in a § 10(b) action, rather than expressly provided by Congress, as in an antitrust action. The Court rejected this distinction, concluding that "the views expressed in *Perma Life* apply with full force to implied causes of action under the federal securities laws." 472 U. S., at 310. Accordingly, it held that the *in pari delicto* defense is available "only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public." *Id.*, at 310–311. The first prong of this test captures the essential elements of the classic *in pari delicto* doctrine. See *id.*, at 307. The second prong, which embodies the doctrine's traditional requirement that public policy implications be carefully considered before the defense is allowed, see *ibid.*, ensures that the broad judge-made law does not undermine the congressional policy favoring private suits as an important mode of enforcing federal securities statutes. Cf. *Perma Life*, 392 U. S., at 139–140. Applying this test to the § 10(b) claim before it, the Court concluded that in such tipster-tippee situations, the two factors precluded recognition of the *in pari delicto* defense. *Bateman Eichler*, 472 U. S., at 317.

A

We do not share the Court of Appeals' narrow vision of the applicability of *Bateman Eichler*. Nothing in this Court's opinion in that case suggests that the *in pari delicto* defense is limited to § 10(b) claims. Nor does the opinion suggest that the doctrine applies only when the plaintiff's fault is intentional or willful.

We feel that the Court of Appeals' notion that the *in pari delicto* defense should not be allowed in actions involving strict liability offenses is without support in history or logic.[11] The doctrine traditionally has been applied in any action based on conduct that "transgresses statutory prohibitions." 2 Restatement of Contracts § 598, Comment *a* (1932). Courts have recognized the defense in cases involving strict liability offenses. See, *e. g., UFITEC, S. A.* v. *Carter*, 20 Cal. 3d 238, 250, 571 P. 2d 990, 996–997 (1977) (violation of Federal Reserve margin requirements); *Miller* v. *California Roofing Co.*, 55 Cal. App. 2d 136, 130 P. 2d 740 (1942) (sale of stock without permit from State Corporation Commission). One of the premises on which the *in pari delicto* doctrine is grounded is that "denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality." *Bateman Eichler*, 472 U. S., at 306. The need to deter illegal conduct is not eliminated simply because a statute creates a strict liability offense rather than punishing willful or negligent misconduct. Regardless of the degree of scienter, there may be circumstances in which the statutory goal of deterring illegal conduct is served more effectively by preclusion of suit than by recovery. In those circumstances, the *in pari delicto* defense should be afforded. Cf. *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38, 43–44, and n. 2 (1941).

In *Bateman Eichler*, the Court granted certiorari to resolve a conflict of authority "over the proper scope of the *in pari delicto* defense in securities litigation." 472 U. S., at 305. The Court formulated the standards under which the defense should be recognized in language applicable generally to federal securities litigation. The formulation was articulated in the specific context of deciding when "a private action for damages [in implied causes of action under the federal securities laws] may be barred on the grounds of the plaintiff's own culpability." *Id.*, at 310. Nevertheless, the Court's rejection of the distinction between implied and express private causes of action, especially when considered in light of the broad question on which the Court granted certiorari, makes clear that the Court assumed that the *in pari delicto* defense should be equally available when Congress expressly provides for private remedies. Thus, we conclude that *Bateman Eichler* provides the appropriate test for allowance of the *in pari delicto* defense in a private action under any of the federal securities laws.

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[11] The Court of Appeals found that this conclusion was compelled by its decision in *Henderson* v. *Hayden, Stone Inc.*, 461 F. 2d 1069 (1972). See 787 F. 2d, at 987–988. That case, we note, does not discuss the *in pari delicto* defense. Accord, 794 F. 2d 1016, 1017 (1986) (opinion dissenting from denial of rehearing of the present case en banc).

Our task, then, is to determine whether, pursuant to this test, recognition of the defense is proper in a suit for rescission brought under § 12(1) of the Securities Act. All parties in this case, as well as the Commission, maintain that the defense should be available.[12] We agree, but find it necessary to circumscribe the scope of its application.

B

Under the first prong of the *Bateman Eichler* test, as we have noted above, a defendant cannot escape liability unless, as a direct result of the plaintiff's own actions, the plaintiff bears at least substantially equal responsibility for the underlying illegality. The plaintiff must be an active, voluntary participant in the unlawful activity that is the subject of the suit. See *Woolf* v. *S. D. Cohn & Co.*, 515 F. 2d 591, 604 (CA5 1975), vacated and remanded on other grounds, 426 U. S. 944 (1976); see also *Bateman Eichler*, 472 U. S., at 312. "Plaintiffs who are truly *in pari delicto* are those who have themselves violated the law in cooperation with the defendant." *Perma Life*, 392 U. S., at 153 (Harlan, J., concurring in part and dissenting in part). Unless the degrees of fault are essentially indistinguishable or the plaintiff's responsibility is clearly greater, the *in pari delicto* defense should not be allowed, and the plaintiff should be compensated. See *id.*, at 146 (WHITE, J., concurring); *id.*, at 147 (Fortas, J., concurring in result); *id.*, at 149 (MARSHALL, J., concurring in result); *Bateman Eichler*, 472 U. S., at 312–314. Refusal of relief to those less blameworthy would frustrate the purpose of the securities laws; it would not serve to discourage the actions of those most responsible for organizing forbidden schemes; and it would sacrifice protection of the general investing public in pursuit of individual punishment. See *Can-Am Petroleum Co.* v. *Beck*, 331 F. 2d 371, 373 (CA10 1964).

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[12] Among the Courts of Appeals that have addressed the issue, the Fifth Circuit is alone in concluding that the defense is unavailable. The defense, however, rarely has succeeded on the facts of any particular case. See, *e. g.*, *Lawler* v. *Gilliam*, 569 F. 2d 1283, 1294 (CA4 1978); *Woolf* v. *S. D. Cohn & Co.*, 515 F. 2d 591, 604 (CA5 1975), vacated and remanded on other grounds, 426 U. S. 944 (1976); *Malamphy* v. *Real-Tex Enterprises, Inc.*, 527 F. 2d 978 (CA4 1975); *Katz* v. *Amos Treat & Co.*, 411 F. 2d 1046, 1054 (CA2 1969); *Can-Am Petroleum Co.* v. *Beck*, 331 F. 2d 371, 373–374 (CA10 1964). Commentators also have suggested that the defense should be available under proper circumstances in actions under § 12(1). See, *e. g.*, Ruder, Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, *In Pari Delicto*, Indemnification, and Contribution, 120 U. Pa. L. Rev. 597, 662–663 (1971–1972); Note, In Pari Delicto Under the Federal Securities Laws: *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 72 Cornell L. Rev. 345, 359–362 (1987).

In the context of a private action under § 12(1), the first prong of the *Bateman Eichler* test is satisfied if the plaintiff is at least equally responsible for the actions that render the sale of the unregistered securities illegal—the issuer's failure to register the securities before offering them for sale, or his failure to conduct the sale in such a manner as to meet the registration exemption provisions. As the parties and the Commission agree, a purchaser's knowledge that the securities are unregistered cannot, by itself, constitute equal culpability, even where the investor is a sophisticated buyer who may not necessarily need the protection of the Securities Act. Barring the investor's recovery under the *in pari delicto* doctrine, "at least on the basis solely of the buyer's knowledge of the violation, is so foreign to the purpose of the section that there is hardly a trace of it in the decisions under

. . . § 12(1)." 3 L. Loss, Securities Regulation 1694 (2d ed. 1961).[13] Although a court's assessment of the relative responsibility of the plaintiff will necessarily vary depending on the facts of the particular case, courts frequently have focused on the extent to which the plaintiff and the defendant cooperated in developing and carrying out the scheme to distribute unregistered securities. See, *e. g.*, *Katz* v. *Amos Treat & Co.*, 411 F. 2d 1046, 1054 (CA2 1969); *Lawler* v. *Gilliam*, 569 F. 2d 1283, 1292–1293 (CA4 1978); *Malamphy* v. *Real-Tex Enterprises, Inc.*, 527 F. 2d 978 (CA4 1975). In addition, if the plaintiff were found to have induced the issuer not to register, he well might be precluded from obtaining § 12(1) rescission.

Under the second prong of the *Bateman Eichler* test, a plaintiff's recovery may be barred only if preclusion of suit does not offend the underlying statutory policies. The primary purpose of the Securities Act is to protect investors by requiring publication of material information thought necessary to allow them to make informed investment decisions concerning public offerings of securities in interstate commerce. *SEC* v. *Ralston Purina Co.*, 346 U. S. 119, 124 (1953); *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U. S., at 43, and n. 2. See H. R. Rep. No. 85, 73d Cong., 1st Sess., 1–5 (1933).[14] The registration requirements are the heart of the Act, and § 12(1) imposes strict liability for violating those requirements. Liability under § 12(1) is a particularly important enforcement tool, because in many instances a private suit is the only effective means of detecting and deterring a seller's wrongful failure to register securities before offering them for sale. *Lawler* v. *Gilliam*, 569 F. 2d, at 1293, citing *Woolf* v. *S. D. Cohn & Co.*, 515 F. 2d, at 605. See also *Bateman Eichler*, 472 U. S., at 310.

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[13] The panel dissent below expressed concern that failure to provide the *in pari delicto* defense in these circumstances would allow sophisticated investors who purchase unregistered securities to place themselves in a no-lose situation. If the venture proves profitable, the buyer comes out ahead. If the investment goes bad, the buyer can sue to recover his investment in a § 12(1) action. See 787 F. 2d, at 995. The statute, however, permits such maneuvers. See Shulman, Civil Liability and the Securities Act, 43 Yale L. J. 227, 246–247 (1933) (Shulman); accord, L. Loss, Fundamentals of Securities Regulation 1003, n. 74 (2d ed. 1988) (Loss). Section 12(1)'s deterrent effect is achieved, to a great extent, by a provision allowing suits for a full year following sale. See 15 U. S. C. § 77m. Thus, the purchaser of unregistered securities may keep his securities and reap his profit if the securities perform well during the year, but rescind the sale if they do not. See, *e. g.*, *Straley* v. *Universal Uranium & Milling Corp.*, 289 F. 2d 370 (CA9 1961). Although this provision may appear to offend a sense of fair play, allowing the investor to sue, regardless of his knowledge of the violation when he purchased the securities, furthers the interest of the Securities Act: the seller then has strong incentive to comply with the registration disclosure provisions. These provisions are concerned with affording the unsophisticated investor information necessary to make a knowledgeable investment decision. Permitting the sophisticated investor to recover also serves to protect the unknowing and innocent investor.

In our view, where the § 12(1) plaintiff is primarily an investor, precluding suit would interfere significantly with effective enforcement of the securities laws and frustrate the primary objective of the Securities Act. The Commission, too, takes this position. Because the Act is specifically designed to protect investors, even where a plaintiff actively participates in the distribution of unregistered securities, his suit should not be barred where his promotional efforts are incidental to his role as an investor. See *Can-Am Petroleum Co.* v. *Beck*, 331 F. 2d, at 373–374 (plaintiff's "relationship as a pure investor became adulterated when she actively assisted in selling others but she at no time had the degree of culpability attributed to defendants and should not be considered as *in pari delicto*"). Cf. *Athas* v. *Day*, 186 F. Supp. 385, 389 (Colo. 1960) (barring recovery to plaintiff who participated extensively as promoter of unlawful securities distribution). Thus, the *in pari delicto* defense may defeat recovery in a § 12(1) action only where the plaintiff's role in the offering or sale of nonexempted, unregistered securities is more as a promoter than as an investor.

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[14] Courts have discerned beneath the registration provisions the same broad policies as those furthered by the securities laws generally: protection of investors as a group, not as individuals, and the need for a healthy economy constantly purged by full disclosure. See, *e. g.*, *SEC* v. *North American Research & Development Corp.*, 280 F. Supp. 106, 121 (SDNY 1968) (purpose of § 5 is to protect public investors through disclosure), aff'd in part and vacated in part on other grounds, 424 F. 2d 63 (CA2 1970). See generally, 1 Loss, Securities Regulation 178–179 (2d ed. 1961) (aim of registration provision is "'to protect honest enterprise . . . ; to restore the confidence of the prospective investor . . . ; to bring into productive channels of industry and development capital which has grown timid . . . ; and to aid in providing employment and restoring buying and consumer power'"), quoting S. Rep. No. 47, 73d Cong., 1st Sess., 1 (1933).

Whether the plaintiff in a particular case is primarily an investor or primarily a promoter depends upon a host of factors, all readily accessible to trial courts. These factors include the extent of the plaintiff's financial involvement compared to that of third parties solicited by the plaintiff, compare *Can-Am Petroleum Co.* v. *Beck*, *supra*, with *Athas* v. *Day*, *supra;* the incidental nature of the plaintiff's promotional activities, see *Malamphy* v. *Real-Tex Enterprises, Inc.*, 527 F. 2d, at 980; the benefits received by the plaintiff from his promotional activities; and the extent of the plaintiff's involvement in the planning stages of the offering (such as whether the plaintiff has arranged an underwriting or prepared the offering materials). We do not mean to suggest that these factors provide conclusive evidence of culpable promotional activity, or that they constitute an exhaustive list of factors to be considered. The courts are free, in the exercise of their sound discretion, to consider whatever facts are relevant to the inquiry.

C

Given the record in this case, we cannot ascertain whether Pinter may successfully assert an *in pari delicto* defense against Dahl's § 12(1) claim.[15] The District Court's findings in this case are not adequate to determine whether Dahl bears at least substantially equal responsibility for the failure to register the oil and gas interests or to distribute the securities in a manner that conformed with the statutory exemption, and whether he was primarily a promoter of the offering.[16] The findings indicate, on the one hand, that Dahl may have participated in initiating the entire investment, and that he loaned money to Pinter and solicited his associates' participation in the venture, but, on the other hand, that Dahl invested substantially more money than the other investor-respondents, expected and received no commission for his endeavors, and drafted none of the offering documents. Furthermore, the District Court made no findings as to who was responsible for the failure to register or for the manner in which the offering was conducted. Those findings will be made on the remand of this case for further proceedings.

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[15] The parties vigorously dispute whether Pinter has a valid defense under the *in pari delicto* doctrine. Pinter argues that Dahl was a "preeminent factor in the violations he seeks to redress." Brief for Petitioners 29. He maintains that the venture would not have been undertaken or, at least, completed, had it not been for Dahl's involvement. According to Pinter, Dahl's responsibility for causing the unlawful sales was at least substantially equal to his own. Nevertheless, Pinter concedes that nothing in the record indicates whether Dahl was a participant in the decision not to register the securities, although Pinter would infer that Dahl was aware of the duty to register. See *id.*, at 27.

Dahl contends that his actions were not of equal fault to those of Pinter. He suggests that Pinter, as the issuer of the securities, was entirely responsible for the failure to register and to fulfill the requirements of Rule 146, although he points to no evidence in the record to support either position. Dahl further argues, in a conclusory fashion, that he was not a promoter of any of the securities in which his co-respondents invested. Finally, he asserts that he should be permitted to recover because "Pinter made the first step in the dissemination of unregistered securities and he will be more responsive to the deterrent pressure of potential sanctions." Brief for Respondents 98.

[16] In dictum, the Court of Appeals ventured that even if it were to apply the *Bateman Eichler* standard, Pinter would not be permitted to advance an *in pari delicto* defense against Dahl's recovery. 787 F. 2d, at 989, n. 6. Because the court did not have our delineation today of the proper inquiry regarding § 12(1) actions, and because we conclude that the District Court's findings were insufficient to conduct this analysis, the Court of Appeals' views on this point are not conclusive of the issue.

III

What we have said as to the availability to Pinter of the *in pari delicto* defense against Dahl's § 12(1) action does not obviate the need to consider the second question presented by petitioners.[17] We turn now to that issue.

In determining whether Dahl may be deemed a "seller" for purposes of § 12(1), such that he may be held liable for the sale of unregistered securities to the other investor-respondents, we look first at the language of § 12(1). See *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 197 (1976). That statute provides, in pertinent part: "Any person who . . . offers or sells a security" in violation of the registration requirement of the Securities Act "shall be liable to the person purchasing such security from him." 15 U. S. C. § 77*l*. This provision defines the class of defendants who may be subject to liability[18] as those who offer or sell unregistered securities.[19] But the Securities Act nowhere delineates who may be regarded as a statutory seller, and the sparse legislative history sheds no light on the issue. The courts, on their part, have not defined the term uniformly.

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[17] Even if the Court of Appeals were ultimately to conclude that Dahl's actions bar his recovery against Pinter pursuant to the *in pari delicto* doctrine, that conclusion would not resolve the issue whether, based on Dahl's actions as a "seller" under § 12(1), Dahl might be held liable for contribution as to the remaining investor-respondents' claims against Pinter. We therefore are constrained to address, as did the Court of Appeals, whether Dahl is a "seller" for purposes of § 12(1).

[18] Section 12 was adapted from common-law (or equitable) rescission, Loss, at 888, which provided for restoration of the status quo by requiring the buyer to return what he received from the seller. The statute, however, differs significantly from the source material. In particular, it permits the buyer who has disposed of the security to sue for damages—"the consideration paid for such security with interest thereon, less the amount of any income received thereon." 15 U. S. C. § 77*l*. This damages calculation results in what is the substantial equivalent of rescission. See

At the very least, however, the language of § 12(1) contemplates a buyer-seller relationship not unlike traditional contractual privity. Thus, it is settled that § 12(1) imposes liability on the owner who passed title, or other interest in the security, to the buyer for value. See Loss, at 1016. Dahl, of course, was not a seller in this conventional sense, and therefore may be held liable only if § 12(1) liability extends to persons other than the person who passes title.[20]

A

In common parlance, a person may offer or sell property without necessarily being the person who transfers title to,

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Randall v. *Loftsgaarden*, 478 U. S. 647, 655–656 (1986); Loss, at 886; Shulman, 43 Yale L. J., at 244.

[19] In addition, § 15 of the Securities Act, 15 U. S. C. § 77*o*, makes a "controlling person" liable for the § 12 liability of a controlled person. That provision is not at issue in this case.

[20] The "offers or sells" and the "purchasing such security from him" language that governs § 12(1) also governs § 12(2), which provides a securities purchaser with a similar rescissionary cause of action for misrepresentation. See 15 U. S. C. § 77*l*. Most courts and commentators have not defined the defendant class differently for purposes of the two provisions. See, *e. g.*, *Pharo* v. *Smith*, 621 F. 2d 656, 665–668, and nn. 6–8 (CA5 1980); Schneider, Section 12 of the Securities Act of 1933: The Privity Requirement in the Contemporary Securities Law Perspective, 51 Tenn. L. Rev. 235, 261, and nn. 144 and 145 (1983–1984). See also *Schillner* v. *H. Vaughan Clarke & Co.*, 134 F. 2d 875, 878 (CA2 1943) ("Clearly the word [sell] has the same meaning in subdivision (2) as in subdivision (1) of section 12").

The question whether anyone beyond the transferor of title, or immediate vendor, may be deemed a seller for purposes of § 12 has been litigated in actions under both § 12(1) and § 12(2). Decisions under § 12(2) addressing the "seller" question are thus relevant to the issue presented to us in this case, and, to that extent, we discuss them here. Nevertheless, this case does not present, nor do we take a position on, the scope of a statutory seller for purposes of § 12(2).

or other interest in, that property. We need not rely entirely on ordinary understanding of the statutory language, however, for the Securities Act defines the operative terms of § 12(1). Section 2(3) defines "sale" or "sell" to include "every contract of sale or disposition of a security or interest in a security, for value," and the terms "offer to sell," "offer for sale," or "offer" to include "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." 15 U. S. C. § 77b(3). Under these definitions, the range of persons potentially liable under § 12(1) is not limited to persons who pass title. The inclusion of the phrase "solicitation of an offer to buy" within the definition of "offer" brings an individual who engages in solicitation, an activity not inherently confined to the actual owner, within the scope of § 12. See Loss, at 1016; Douglas & Bates, The Federal Securities Act of 1933, 43 Yale L. J. 171, 206–207 (1933). Indeed, the Court has made clear, in the context of interpreting § 17(a) of the Securities Act, 15 U. S. C. § 77q(a), that transactions other than traditional sales of securities are within the scope of § 2(3) and passage of title is not important. See *United States* v. *Naftalin*, 441 U. S. 768, 773 (1979). We there explained: "The statutory terms ["offer" and "sell"], which Congress expressly intended to define broadly, . . . are expansive enough to encompass the entire selling process, including the seller/agent transaction." *Ibid.* See also *Rubin* v. *United States*, 449 U. S. 424, 430 (1981) ("It is not essential under the terms of the Act that full title pass to a transferee for the transaction to be an 'offer' or a 'sale' ").

Determining that the activity in question falls within the definition of "offer" or "sell" in § 2(3), however, is only half of the analysis. The second clause of § 12(1), which provides that only a defendant "from" whom the plaintiff "purchased" securities may be liable, narrows the field of potential sellers.[21] Several courts and commentators have stated that the purchase requirement necessarily restricts § 12 primary liability to the owner of the security. *E. g., Beck* v. *Cantor, Fitzgerald & Co.*, 621 F. Supp. 1547, 1560–1561 (ND Ill. 1985); Abrams, The Scope of Liability Under Section 12 of the Securities Act of 1933: "Participation" and the Pertinent Legislative Materials, 15 Ford. Urban L. J. 877 (1987); see also *Collins* v. *Signetics Corp.*, 605 F. 2d 110, 113 (CA3 1979) (absent some "special relationship"—*e. g.*, control—§ 12 requires privity between statutory seller and buyer). In effect, these authorities interpret the term "purchase" as complementary to only the term "sell" defined in § 2(3). Thus, an offeror, as defined by § 2(3), may incur § 12 liability only if the offeror also "sells" the security to the plaintiff, in the sense of transferring title for value. Abrams, 15 Ford. Urban L. J., at 922–923.

We do not read § 12(1) so restrictively. The purchase requirement clearly confines § 12 liability to those situations in which a sale has taken place. Thus, a prospective buyer has no recourse against a person who touts unregistered securities to him if he does not purchase the securities. Loss, at 884. The requirement, however, does not exclude solicitation from the category of activities that may render a person liable when a sale has taken place. A natural reading of the statutory language would include in the statutory seller status at least some persons who urged the buyer to purchase. For example, a securities vendor's agent who solicited the purchase would commonly be said, and would be thought by the buyer, to be among those "from" whom the buyer "purchased," even though the agent himself did not pass title. See *Cady* v. *Murphy*, 113 F. 2d 988, 990 (CA1) (finding broker acting as agent of the owner liable as a statutory seller), cert. denied, 311 U. S. 705 (1940).

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[21] One important consequence of this provision is that § 12(1) imposes liability on only the buyer's immediate seller; remote purchasers are precluded from bringing actions against remote sellers. Thus, a buyer cannot recover against his seller's seller. Loss, at 1023–1024; Douglas & Bates, 43 Yale L. J., at 177.

The Securities Act does not define the term "purchase." The soundest interpretation of the term, however, is as a correlative to both "sell" and "offer," at least to the extent that the latter entails active solicitation of an offer to buy. This interpretation is supported by the history of the phrase "offers or sells," as it is used in § 12(1). As enacted in 1933, § 12(1) imposed liability on "[a]ny person who . . . sells a security." 48 Stat. 84. The statutory definition of "sell" included "offer" and the activities now encompassed by that term, including solicitation. *Id.*, at 74. The words "offer or" were added to § 12(1) by the 1954 amendments to the Securities Act, when the original definition of "sell" in § 2(3) was split into separate definitions of "sell" and "offer" in order to accommodate changes in § 5. 68 Stat. 683, 686. Since "sells" and "purchases" have obvious correlative meanings, Congress' express definition of "sells" in the original Securities Act to include solicitation suggests that the class of those from whom the buyer "purchases" extended to persons who solicit him. The 1954 amendment to § 12(1) was intended to preserve existing law, including the liability provisions of the Act. H. R. Rep. No. 1542, 83d Cong., 2d Sess., 26 (1954); S. Rep. No. 1036, 83d Cong., 2d Sess., 18 (1954); Loss, at 884. Hence, there is no reason to think Congress intended to narrow the meaning of "purchased from" when it amended the statute to include "solicitation" in the statutory definition of "offer" alone.[22]

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[22] It is noteworthy that in 1940 Congress considered a proposal that would have excluded the solicitation clause from the definition of "sell" in § 2(3). See S. 3985, 76th Cong., 3d Sess., 1–2 (1940), as introduced, 86 Cong. Rec. 6026 (1940). This amendment clearly would have reduced the meaning of the term "sell" to transferring title for value and would have eliminated the potential for liability of brokers or other persons soliciting a sale of securities. The proposal was not adopted.

The applicability of § 12 liability to brokers and others who solicit securities purchases has been recognized frequently since the passage of the Securities Act. It long has been "quite clear," that when a broker acting as agent of one of the principals to the transaction successfully solicits a purchase, he is a person from whom the buyer purchases within the meaning of § 12 and is therefore liable as a statutory seller. See Loss, at 1016. Indeed, courts had found liability on this basis prior to the 1954 amendment of the statute. See, *e. g.*, *Wall* v. *Wagner*, 125 F. Supp. 854, 858 (Neb. 1954), aff'd *sub nom. Whittaker* v. *Wall*, 226 F. 2d 868, 873 (CA8 1955) (principal and its agents); *Schillner* v. *H. Vaughan Clarke & Co.*, 134 F. 2d 875, 879 (CA2 1943) (seller's broker); *Cady* v. *Murphy*, *supra* (seller's broker); *Boehm* v. *Granger*, 42 N. Y. S. 2d 246, 248 (Sup. 1943), aff'd, 268 App. Div. 855, 50 N. Y. S. 2d 845 (1944) (buyer's broker). Had Congress intended liability to be restricted to those who pass title, it could have effectuated its intent by not adding the phrase "offers or" when it split the definition of "sell" in § 2(3).

An interpretation of statutory seller that includes brokers and others who solicit offers to purchase securities furthers the purposes of the Securities Act—to promote full and fair disclosure of information to the public in the sales of securities. In order to effectuate Congress' intent that § 12(1) civil liability be *in terrorem*, see Douglas & Bates, 43 Yale L. J., at 173; Shulman, 43 Yale L. J., at 227, the risk of its invocation should be felt by solicitors of purchases. The solicitation of a buyer is perhaps the most critical stage of the selling transaction. It is the first stage of a traditional securities sale to involve the buyer, and it is directed at producing the sale. In addition, brokers and other solicitors are well positioned to control the flow of information to a potential purchaser, and, in fact, such persons are the participants in the selling transaction who most often disseminate material information to investors. Thus, solicitation is the stage at which an investor is most likely to be injured, that is, by being persuaded to purchase securities without full and fair information. Given Congress' overriding goal of preventing this injury, we may infer that Congress intended solicitation to fall under the mantle of § 12(1).

Although we conclude that Congress intended § 12(1) liability to extend to those who solicit securities purchases, we share the Court of Appeals' conclusion that Congress did not intend to impose rescission based on strict liability on a person who urges the purchase but whose motivation is solely to benefit the buyer. When a person who urges another to make a securities purchase acts merely to assist the buyer, not only is it uncommon to say that the buyer "purchased" from him, but it is also strained to describe the giving of gratuitous advice, even strongly or enthusiastically, as "soliciting." Section 2(3) defines an offer as a "solicitation of an offer to buy . . . for value." The person who gratuitously urges another to make a particular investment decision is not, in any meaningful sense, requesting value in exchange for his suggestion or seeking the value the titleholder will obtain in exchange for the ultimate sale. The language and purpose of § 12(1) suggest that liability extends only to the person who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner. If he had such a motivation, it is fair to say that the buyer "purchased" the security from him and to align him with the owner in a rescission action.[23]

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[23] Those commentators who argue that § 12 confines seller status to the transferor maintain that the section's provision of rescissionary relief supports their conclusion. *E. g.*, Abrams, 15 Ford. Urban L. J., at 924. There is authority at common law, however, for granting a plaintiff rescission against a defendant who was not a party to the contract in question, in particular, against the agent of the vendor. See, *e. g.*, *Keskal* v. *Modrakowski*, 249 N. Y. 406, 408, 164 N. E. 333 (1928); *Peterson* v. *McManus*, 187 Iowa 522, 545–549, 172 N. W. 460, 468–470 (1919). Indeed, there is nothing incongruous about forcing a broker or other solicitor to assume ownership of the securities. When rescission is predicated on fraud, rather than based on contract theory, privity is not essential. Loss, at 1017, quoting *Gordon* v. *Burr*, 506 F. 2d 1080, 1085 (CA2 1974) ("[A]s

B

Petitioner is not satisfied with extending § 12(1) primary liability to one who solicits securities sales for financial gain. Pinter assumes, without explication, that liability is not limited to the person who actually parts title with the securities, and urges us to validate, as the standard by which additional defendant-sellers are identified, that version of the "substantial factor" test utilized by the Fifth Circuit before the refinement espoused in this case.[24] Under that approach,

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between the innocent purchaser and the wrongdoer who, though not a privy to the fraudulent contract, nonetheless induced the victim to make the purchase, equity requires the wrongdoer to restore the victim to the status quo"). In any event, there is no reason to think that Congress wanted to bind itself to the common-law notion of the circumstances in which rescission is an appropriate remedy. The Court, in the context of § 12(2), has noted that Congress enabled investors to demand rescission upon tender of the securities to the defendant, in part because of the additional measure of deterrence provided by rescission as compared to a purely compensatory measure of damages. *Randall* v. *Loftsgaarden*, 478 U. S., at 659. Thus, we may infer that Congress, in order to effectuate its goals, chose to impose this relief on any defendant it classified as a statutory seller, regardless of the fact that such imposition was somewhat inconsistent with the use of rescission at common law. Congress chose rescission for its effects; there is no indication that Congress employed the remedy for its delineation of potential defendants.

[24] The Fifth Circuit's test is only one of several approaches that have emerged in expanding § 12 liability beyond the security titleholder. See generally O'Hara, Erosion of the Privity Requirement in Section 12(2) of the Securities Act of 1933: The Expanded Meaning of Seller, 31 UCLA L. Rev. 921 (1983–1984); Rapp, Expanded Liability Under Section 12 of the Securities Act: When Is a Seller Not a Seller?, 27 Case W. Res. L. Rev. 445 (1977); Note, Seller Liability Under Section 12(2) of the Securities Act of 1933: A Proximate Cause-Substantial Factor Approach Limited by a Duty of Inquiry, 36 Vand. L. Rev. 361 (1983); Comment, Attorneys and Participant Liability Under § 12(2) of the Securities Act of 1933, 1982 Ariz. S. L. J. 529. All but one of these theories reflect the courts' views of who constitutes a § 12 seller. The remaining approach—the aiding and abetting theory—is actually a method by which courts create secondary liability in persons other than the statutory seller. See, *e. g.*, *Mayer* v. *Oil Field Systems Corp.*, 803 F. 2d 749, 756 (CA2 1986); *In re Caesars Palace*

grounded in tort doctrine, a nontransferor § 12(1) seller is defined as one "whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place." *Pharo* v. *Smith*, 621 F. 2d 656, 667 (CA5 1980).[25]

Securities Litigation, 360 F. Supp. 366 (SDNY 1973); see also *Collins* v. *Signetics Corp.*, 605 F. 2d 110, 113–114 (CA3 1979) (leaving open whether aiding and abetting liability is available). Because this case deals exclusively with primary liability under § 12(1), we need not consider whether civil liability for aiding and abetting is appropriate under that section. Compare Comment, 1982 Ariz. S. L. J., at 550–577 (endorsing aiding and abetting liability under § 12(2)); Ruder, 120 U. Pa. L. Rev., at 620–644 (same), with Abrams, 15 Ford. Urban L. J., at 942–947 (disapproving secondary liability under § 12); O'Hara, 31 UCLA L. Rev., at 979–1002 (arguing that any form of participant liability, whether primary or secondary, is inappropriate under § 12(2)).

[25] The substantial-factor test reflects a conviction that § 12 liability "must lie somewhere between the narrow view, which holds only the parties to the sale, and the too-liberal view which would hold all who remotely participated in the events leading up to the transaction." *Lennerth* v. *Mendenhall*, 234 F. Supp. 59, 65 (ND Ohio 1964). That court elected to "borrow a phrase from the law of negligence" and to premise liability on proximate cause. It imposed § 12(1) liability on the issuer that transferred title and the issuer's president, vice president, and another employee. The Fifth Circuit adopted the proximate cause rationale in *Hill York Corp.* v. *American International Franchises, Inc.*, 448 F. 2d 680, 693 (1971) (holding that promoters of a nationwide franchising scheme were § 12 sellers), and two years later refined the doctrine to impose liability on defendants whose actions were a " 'substantial factor' " in causing a plaintiff's purchases. See *Lewis* v. *Walston & Co.*, 487 F. 2d 617, 622 (CA5 1973) (affirming § 12(1) judgment against a brokerage firm and its representative who touted unregistered securities and arranged for their purchase by the plaintiff).

A number of courts have followed that view. See *Lawler* v. *Gilliam*, 569 F. 2d, at 1287-1288 (§ 12(1)); *Adalman* v. *Baker, Watts & Co.*, 807 F. 2d 359, 363 (CA4 1986) (§ 12(2)); *Davis* v. *Avco Financial Services, Inc.*, 739 F. 2d 1057, 1067 (CA6 1984) (§ 12(2)), cert. denied, 470 U. S. 1005 (1985); *Stokes* v. *Lokken*, 644 F. 2d 779, 785 (CA8 1981) (§ 12 generally); *Foster* v. *Jesup & Lamont Securities Co.*, 759 F. 2d 838, 843–844 (CA11 1985) (§ 12 generally).

The Ninth Circuit has shaped its own version of the test. See *Anderson* v. *Aurotek*, 774 F. 2d 927, 930 (1985) (imposing § 12 liability on " 'partici-

The Court of Appeals acknowledged that Dahl would be liable as a statutory seller under this test. 787 F. 2d, at 990.

We do not agree that Congress contemplated imposing § 12(1) liability under the broad terms petitioners advocate. There is no support in the statutory language or legislative history for expansion of § 12(1) primary liability beyond persons who pass title and persons who "offer," including those who "solicit" offers. Indeed, § 12's failure to impose express liability for mere participation in unlawful sales transactions suggests that Congress did not intend that the section impose liability on participants collateral to the offer or sale. When Congress wished to create such liability, it had little trouble doing so. Cf. *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 572 (1979).[26]

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pants' whose acts are 'both necessary to and a substantial factor in the sales transaction'"). See also *SEC* v. *Rogers*, 790 F. 2d 1450, 1456 (CA9 1986) (explaining that the "necessary" and "substantial factor" prongs require separate showings: "The first prong . . . requires a defendant's participation to be a 'but for' cause of the unlawful sale, and the second requires the participation to be more than 'de minimis'").

[26] Congress knew of the collateral participation concept and employed it in the Securities Act and throughout its unified program of securities regulation. Liabilities and obligations expressly grounded in participation are found elsewhere in the Act, see, *e. g.*, 15 U. S. C. § 77b(11) (defining "underwriter," who is liable under § 5, as including direct and indirect participants), and in the later Roosevelt administration securities Acts. For example, § 9 of the 1934 Act, passed by the same Congress that enacted the Securities Act, creates a private right of action that expressly imposes liability on participants. 15 U. S. C. § 78i(e). See Abrams, 15 Ford. Urban L. J., at 925–937.

Section 11 of the Securities Act, 15 U. S. C. § 77k, lends strong support to the conclusion that Congress did not intend to extend § 12 primary liability to collateral participants in the unlawful securities sales transaction. That section provides an express cause of action for damages to a person acquiring securities pursuant to a registration statement that misstates or omits a material fact. Section 11(a) explicitly enumerates the various categories of persons involved in the registration process who are subject to suit under that section, including many who are participants in the activities leading up to the sale. There are no similar provisions in § 12, and

The deficiency of the substantial-factor test is that it divorces the analysis of seller status from any reference to the applicable statutory language and from any examination of § 12 in the context of the total statutory scheme. Those courts that have adopted the approach have not attempted to ground their analysis in the statutory language. See n. 25, *supra*. Instead, they substitute the concept of substantial participation in the sales transaction, or proximate causation of the plaintiff's purchase, for the words "offers or sells" in § 12. The "purchase from" requirement of § 12 focuses on the defendant's relationship with the plaintiff-purchaser. The substantial-factor test, on the other hand, focuses on the defendant's degree of involvement in the securities transaction and its surrounding circumstances. Thus, although the substantial-factor test undoubtedly embraces persons who pass title and who solicit the purchase of unregistered securities as statutory sellers, the test also would extend § 12(1) liability to participants only remotely related to the relevant aspects of the sales transaction. Indeed, it might expose securities professionals, such as accountants and lawyers, whose involvement is only the performance of their professional services, to § 12(1) strict liability for rescission. The buyer does not, in any meaningful sense, "purchas[e] the security from" such a person.[27]

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therefore we may conclude that Congress did not intend such persons to be defendants in § 12 actions.

[27] For similar reasons, we reject the Commission's suggestion that persons who "participate in soliciting the purchase" may be liable as statutory sellers. Brief for SEC as *Amicus Curiae* 22. The Commission relies on *Katz* v. *Amos Treat & Co.*, 411 F. 2d 1046 (CA2 1969), where the court held that an attorney who had been "a party to the solicitation" of the plaintiff-purchaser was liable under § 12(1) because he had placed the brokerage firm for which he worked in a position "to tackle [the purchaser] for the money" owed on an investment he had made. *Id.*, at 1053. Although in *Katz* the attorney spoke directly to the plaintiff prior to the delivery of money in plaintiff's investment, the "party to a solicitation" concept could easily embrace those who merely assist in another's solicitation

Further, no congressional intent to incorporate tort law doctrines of reliance and causation into § 12(1) emerges from the language or the legislative history of the statute. Indeed, the strict liability nature of the statutory cause of action suggests the opposite. See Douglas & Bates, 43 Yale L. J., at 177. By injecting these concepts into § 12(1) litigation, the substantial-factor test introduces an element of uncertainty into an area that demands certainty and predictability. As the Fifth Circuit has conceded, the test affords no guidelines for distinguishing between the defendant whose conduct rises to a level of significance sufficient to trigger seller status, and the defendant whose conduct is not sufficiently integral to the sale. See *Pharo* v. *Smith*, 621 F. 2d, at 667.[28] None of the courts employing the approach has articulated what measure of participation qualifies a person for seller status, and logically sound limitations would be difficult to develop. As a result, decisions are made on an ad hoc basis, offering little predictive value to participants in securities transactions. See *Croy* v. *Campbell*, 624 F. 2d 709, 714 (CA5 1980); *Pharo* v. *Smith*, 621 F. 2d, at 667. We find it particularly unlikely that Congress would have ordained *sub silentio* the imposition of strict liability on such an unpredictably defined class of defendants.

Not surprisingly, Pinter makes no attempt to justify the substantial-factor test as a matter of statutory construction. Instead, the sole justification Pinter advances is that extend-

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efforts. See Schneider, 51 Tenn. L. Rev., at 273 (suggesting that the *Katz* approach allows courts to interpret solicitation activities "rather broadly"). It is difficult to see more than a slight difference between this approach and the participation theory, which we have concluded does not comport with Congress' intent.

[28] Even in the tort law context, the substantial-factor test is recognized as inadequate for determining whether the defendant's conduct was so significant and important a cause that the law should extend responsibility for the conduct to the consequences that occurred. See W. Prosser, Law of Torts § 42, pp. 244, 248 (4th ed. 1971).

ing § 12 liability pursuant to the test protects investors and serves the "remedial purposes" of the Securities Act. See also, *e. g.*, *Lennerth* v. *Mendenhall*, 234 F. Supp. 59, 65 (ND Ohio 1964). The Court has acknowledged that "it is proper for a court to consider . . . policy considerations in construing terms in [the federal securities] Acts." *Landreth Timber Co.* v. *Landreth*, 471 U. S. 681, 695, n. 7 (1985). And the Court has recognized that Congress had "broad remedial goals" in enacting the securities laws and providing civil reme-dies. *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 200; *Tcherepnin* v. *Knight*, 389 U. S. 332, 336 (1967). Accordingly, the Court itself has construed securities law provisions "'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'" *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 151 (1972), quoting *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 195 (1963). But the Court never has conducted its analysis entirely apart from the statutory language. "The ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross & Co.* v. *Redington*, 442 U. S., at 578. The ascertainment of congressional intent with respect to the scope of liability created by a particular section of the Securities Act must rest primarily on the language of that section. See *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 472 (1977). The broad remedial goals of the Securities Act are insufficient justification for interpreting a specific provision "'more broadly than its language and the statutory scheme reasonably permit.'" *Touche Ross*, 442 U. S., at 578, quoting *SEC* v. *Sloan*, 436 U. S. 103, 116 (1978). We must assume that Congress meant what it said.

The substantial-factor test reaches participants in sales transactions who do not even arguably fit within the definitions set out in § 2(3); it "would add a gloss to the operative language of [§ 12(1)] quite different from its commonly accepted meaning." *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 199. We conclude that Congress did not intend such a gross departure from the statutory language. Accordingly, we need not entertain Pinter's policy arguments.[29] Being merely a "substantial factor" in causing the sale of unregistered securities is not sufficient in itself to render a defendant liable under § 12(1).

C

We are unable to determine whether Dahl may be held liable as a statutory seller under § 12(1). The District Court explicitly found that "Dahl solicited each of the other plaintiffs (save perhaps Grantham) in connection with the offer, purchase, and receipt of their oil and gas interests." App. to Pet. for Cert. a–34. We cannot conclude that this finding was clearly erroneous. It is not clear, however, that Dahl had the kind of interest in the sales that make him liable as a statutory seller. We do know that he received no commission from Pinter in connection with the other sales, but this is not conclusive. Typically, a person who solicits the purchase will have sought or received a personal financial benefit from the sale, such as where he "anticipat[es] a share of the profits," *Lawler* v. *Gilliam*, 569 F. 2d, at 1288, or receives a brokerage commission, *Cady* v. *Murphy*, 113 F. 2d, at 990. But a person who solicits the buyer's purchase in order to serve the financial interests of the owner may properly be liable under § 12(1) without showing that he expects to participate in the benefits the owner enjoys.

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[29] We observe, however, that although every rule that extends liability serves on some level to protect investors, the substantial-factor test does not necessarily further the remedial purposes of § 12(1). Imposing a strict liability rescission remedy on those who are only tangentially involved with the sale might result in less and poorer information to investors, rather than more and better information. Because strict liability is involved, once a person became involved in the transaction, even peripherally, it would be impossible to avoid the risk of liability. There is little danger that this risk will deter true sellers from giving information, for they have no other way to go about their business. They also have the most control over conducting the sale in a manner that avoids liability. For those more attenuated to the sales transaction, however, who have far less, if any, control over the transaction, the harshness of § 12(1) might deter them from assisting. Particularly since the test produces unpredictable results, it risks over-deterring activities related to lawful securities sales.

The Court of Appeals apparently concluded that Dahl was motivated entirely by a gratuitous desire to share an attractive investment opportunity with his friends and associates. See 787 F. 2d, at 991. This conclusion, in our view, was premature. The District Court made no findings that focused on whether Dahl urged the other purchases in order to further some financial interest of his own or of Pinter. Accordingly, further findings are necessary to assess Dahl's liability.[30]

IV

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE STEVENS, dissenting.

Although I substantially agree with the Court's discussion of the *in pari delicto* defense in Parts II–A and II–B of its opinion, I disagree with its application of that discussion to the facts of this case.[1] Moreover, I am unable to join Part

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[30] Of course, on remand the Court of Appeals may find it necessary to address some of the difficult and unsettled questions raised by the dissent concerning the availability of contribution in § 12(1) cases in general and in this case in particular.

[1] The Court holds that "[i]n the context of a private action under § 12(1), the first prong of the *[in pari delicto]* test is satisfied if the plaintiff is at least equally responsible for the actions that render the sale of the unregistered securities illegal—the issuer's failure to register the securities before offering them for sale, or his failure to conduct the sale in such a manner as to meet the registration exemption provisions." *Ante*, at 636. I agree that a plaintiff who is at least equally responsible for "the issuer's failure to register the securities before offering them for sale" can be held

III because I am persuaded that the discussion of the § 12(1) term "seller" in the context of a contribution suit is both advisory, because no such suit was brought in this case, and misleading, because it assumes that the class of persons who sell securities to purchasers (*i. e.*, § 12(1) "sellers") is coextensive with the class of potential defendants in claims for contribution, not brought directly under § 12(1), asserted by § 12(1) sellers. § 12(1), Securities Act of 1933, 15 U. S. C. § 77*l*(1).

I

In this case, Pinter had the burden of proving that Dahl shared at least equal responsibility for the action that resulted in the § 12(1) violation, *i. e.*, the failure to register the securities. But, as the Court notes, Pinter has conceded that "nothing in the record indicates whether Dahl was a participant in the decision not to register the securities." *Ante*, at 640, n. 15; see Brief for Petitioners 27. Further, the Court of Appeals concluded, and it is undisputed here, that there is no evidence that Dahl knew that the failure to register the securities was unlawful.[2]

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in pari delicto. I am perplexed, though, by the Court's conclusion that a plaintiff who is at least equally responsible for "the issuer's failure to conduct the sale in such a manner as to meet the registration exemption provision" can be held *in pari delicto.* Such a failure is of course never a sufficient condition for § 12(1) strict liability; regardless of how many exemptions for which an offering fails to qualify, § 12(1) is not violated unless the securities in question are offered or sold without registration. Thus, it is hard for me to understand how a plaintiff who bears substantially equal responsibility for the loss of an exemption but who does not bear similar responsibility for the proximate cause of the illegality—the failure to register—can be considered *in pari delicto.* Part I, *infra,* reflects my view of how the *in pari delicto* issue in this case should be resolved under what I deem to be the proper view of the defense.

[2] "There is no evidence, however, that Dahl knew that Pinter's failure to register was in violation of federal and state securities laws." 787 F. 2d 985, 987 (CA5 1986).

Pinter's "infer[ence] that Dahl was aware of the duty to register," *ante*, at 640, n. 15; see Brief for Petitioners 27, is thus directly contradicted by the Court of Appeals' conclusion.

Because "the District Court made no findings as to who was responsible for the failure to register or for the manner in which the offering was conducted," *ante*, at 641, the majority concludes that we must remand for further findings. It seems to me, though, that the District Court's failure to make findings on the critical issue of responsibility for failure to register is properly attributed to Pinter's failure to direct the court's attention to the issue. Pinter pleaded his *in pari delicto* defense as follows:

> "The Plaintiff, M. Dahl, engaged in fraudulent misrepresentations to Pinter and the other Plaintiffs, all as set forth in the Defendant's Counterclaim. He is therefore barred from recovery for the causes of action set forth in [Plaintiffs' First Amended Complaint], by reason of his conduct *in pari delicto* in connection with the offer, sale and delivery of the securities of that which he complains." App. 67.

In light of the fact that the District Court expressly found that the "evidence did not establish that defendants are entitled to any relief on their counterclaims," App. to Pet. for Cert. a–38, it would seem to follow that the District Court also found that there was no factual basis for the *in pari delicto* affirmative defense as pleaded.

Pinter did, though, in his proposed findings of fact and conclusions of law, set forth a somewhat different theory for the *in pari delicto* defense. He proposed as a conclusion of law that "[a]s a result of his participation in the solicitation of the investment by other Plaintiffs in the subject lease transactions, Dahl is in pari delicto and cannot recover in this action as a matter of law." 2 Record 274. Thus, if one construes this proposal liberally as amending the pleading, it is fair to conclude that the District Court was at least directed to examine the nature of Dahl's participation in the solicitation of others to invest in the Pinter leases. But nowhere in his proposed findings of fact or conclusions of law did Pinter suggest that Dahl played any role in the failure to register the securities. To be sure, in arguing that the private offering exemption should apply, Pinter asked the court to find that Dahl "received or collected most of the investment proceeds from [the other investors] and hand delivered the funds to Pinter. He had disclosure of or access to all of the information requisite to a registration statement." *Id.*, at 395. But all of this was proposed to convince the court that the private offering exemption applied, and, more importantly, none of it suggests that Dahl aided Pinter in any way in the latter's decision not to (or failure to) register the securities. Thus, by permitting Pinter to argue now, on remand, for the first time, that Dahl played a role in the failure to register, the majority gives Pinter a second chance to litigate an issue that he was in no way prevented from litigating the first time before the District Court. Since there is nothing in the record to suggest that the District Court committed any error of law in rejecting the *in pari delicto* defense, the fact that the Court of Appeals may have entertained a different legal view of the defense than we do is not a sufficient reason for giving Pinter another opportunity to prove facts that he failed to establish at trial.[3]

II

The question concerning Pinter's possible right to contribution from Dahl relates only to the proceeds of the sales to the plaintiffs other than Dahl who elected to sue Pinter and not Dahl. Initially, it is unclear how this matter is properly before us. The Court acknowledges that "Pinter's pleadings do not state an explicit cause of action for contribution against Dahl," see *ante*, at 630, n. 9, and suggests that "the Court of Appeals construed Pinter's affirmative defense for contributory fault and his incorporation of this defense into his counterclaims, as effectively seeking contribution." *Ibid.* If this were so then the matter is easily resolvable, for as I have pointed out *supra*, at 657, the District Court expressly found that the "evidence did not establish that defendants are entitled to any relief on their counterclaims," and there is nothing in the record indicating (nor any assertion here) that the District Court applied an erroneous legal standard in rejecting the counterclaims. In any event, Pinter in fact brought no claim for contribution, and the fact that the Court of Appeals saw fit to discuss whether Dahl could be held liable in such a hypothetical lawsuit does not, in my opinion, justify the issuance of an advisory opinion by this Court.[4]

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[3] Indeed, the Court of Appeals may find that Texas law requires a reentry of its judgment. The District Court found that Pinter had violated not only § 12(1) of the Securities Act of 1933, but also Tex. Rev. Civ. Stat. Ann., Art. 581–33(A), (D) (Vernon Supp. 1988), and that the same remedy was authorized by both statutes. See App. to Pet. for Cert. a–37—a–38. The Court of Appeals affirmed the finding of liability under Texas law, and also squarely held that Dahl was not a "seller" within the meaning of the Texas statute. See 787 F. 2d, at 991. It is true that the Court of Appeals did not reach the question whether an *in pari delicto* defense might be available under Texas law. *Id.*, at 990. If it should conclude, however, that Texas would not recognize that defense on the facts of this case, its judgment should stand regardless of the outcome of any further proceedings concerning the federal issues.

Even if there is a right to contribution in cases like this,[5] and even if Pinter had alleged a claim for contribution against

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[4] Thus, the Court of Appeals on remand may have no choice but to affirm the District Court's judgment once again, this time on the ground that no contribution claim is properly before it.

[5] The Court "express[es] no view as to whether a right of contribution exists under § 12(1) of the Securities Act." *Ante*, at 630, n. 9. The Court of Appeals pointed out that "no code section specifically allows for a right of contribution against a 'seller' in Dahl's position." 787 F. 2d, at 990, n. 8. Such a right might be found, the court stated, in § 16 of the Act, 15 U. S. C. § 77p, which provides that "[t]he rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity." Whether the availability of such additional rights and remedies depends upon the satisfaction of conditions set forth elsewhere in the Act—such as § 12(1)—is surely an open question.

I note also that this Court has been reluctant to imply a right to contribution in statutes silent on the issue. Compare *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630 (1981) (no right to contribution under the federal antitrust laws); *Northwest Airlines, Inc.* v. *Transport*

Dahl, I see no reason for assuming that the merits of such a claim would be governed by the definition of the term "seller" as used in § 12(1). For even if Dahl might be regarded as a seller in an action brought by the other purchasers of unregistered securities, Pinter would have a right to contribution against Dahl only if Dahl had received some of the proceeds of sale for which Pinter had been held accountable. Moreover, the contours of the right to contribution may be such that if Dahl had shared in those proceeds knowing that they had been obtained in violation of law, he might have to return his share even if he was not technically a "seller" of any securities. For it is by no means clear that the class of persons who may be held liable for contribution to those held primarily liable in § 12(1) rescission actions should be limited to those who "successfully solici[t] the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." *Ante*, at 647. Thus, the Court's discussion of the "seller" issue is neither sufficient nor necessary for the resolution of Pinter's putative contribution claim.

It would be necessary, however, in resolving a contribution claim such as this, to determine whether the defendant had to account for any proceeds that were actually held by the third-party (contribution) defendant. For § 12(1) is an action for rescission. The statute expressly provides that the purchaser of an unregistered security may "recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of

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Workers, 451 U. S. 77 (1981) (no right to contribution by employer against union for violations of either the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964); and *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, 285 (1952) (Court refuses to fashion right to maritime contribution in noncollision cases, concluding that "the solution of this problem should await congressional action"); with *United States* v. *Yellow Cab Co.*, 340 U. S. 543 (1951) (Congress waived sovereign immunity in the Federal Tort Claims Act for contribution claims against the United States).

such security. . . ." 15 U. S. C. § 77*l*(1). The judgment entered by the District Court tracked the language of the statute. After reciting that the plaintiffs had made a tender of the securities purchased from Pinter, it ordered that each of them "have judgment against B. J. Pinter, individually and d/b/a/ Black Gold Oil Company, in the amount of their purchase price for the securities purchased, plus prejudgment interest thereon at the rate of 6% annum from the date of payment of their purchase price in May, 1981, less the amount of any income a Plaintiff received on the security. . . ." App. 92.

The District Court found that all of the unregistered securities were "offered, sold and delivered" by the defendant Pinter "individually and d/b/a/ Black Gold Oil Company," App. to Pet. for Cert. a–32, and it is undisputed that all of the proceeds of sale were received by Pinter. Specifically, the District Court found:

> "Dahl did not receive from defendants any commission, by way of discount or otherwise, in connection with the purchase by any plaintiff of the fractional undivided oil and gas interests involved in this suit." *Id.*, at a–34.

Given the undisputed facts, the statutory remedy of rescission[6] was complete when the securities were returned in exchange for the purchase price plus interest. Even if there may be a basis for a right to contribution in cases in which one seller has shared the proceeds of sale with another and has been held liable for those proceeds, it seems obvious to me that the scheme of the statute would be frustrated by allowing a seller to recover from a third party who did not receive any part of the purchase price.[7] The Court of Appeals expressly recognized this independent basis for affirmance when it stated:

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[6] It should be noted that the statutory remedy for damages is not applicable in this case because that remedy is only available if the purchaser "no longer owns the security." 15 U. S. C. § 77*l*(1).

[7] Another way of putting this is that a defendant in a rescission suit cannot claim contribution when he received the entire proceeds of sale and merely returned those proceeds to the plaintiff in exchange for the plain-

> "In light of the clear purpose of section 12(1) to disgorge the purchase price from the seller of unregistered securities, we view as unsound any result which would permit Pinter to retain part of the consideration paid by plaintiffs." 787 F. 2d 985, 990, n. 8 (CA5 1986).

In my opinion, this is a sufficient reason for affirming the judgment of the Court of Appeals.

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tiff's tender of the purchased item (here, the securities). See *Olson* v. *Thompson*, 273 Minn. 152, 154–155, 140 N. W. 2d 321, 322 (1966) ("While the action is one sounding in tort, the relief sought is for rescission, requiring restitution of the purchase price and a reassignment of the leases. In his third-party action Thompson makes no demand for damages, and the theory on which he claims contribution is not clear, since the parties by the nature of the action are merely restored to the status quo ante"). Thus, it is a basic principle of equity jurisprudence that a claim for contribution only lies for a defendant who "has actually paid or satisfied more than his proportionate share of the debt or obligation." 4 S. Symons, Pomeroy's Equity Jurisprudence 1071–1072 (5th ed. 1941); see also Restatement (Second) of Torts § 886A(2) (1979) ("The right of contribution exists only in favor of a tortfeasor who has discharged the entire claim for the harm by paying more than his equitable share of the common liability, and is limited to the amount paid by him in excess of his share. No tortfeasor can be required to make contribution beyond his own equitable share of the liability").

HUFFMAN ET AL. *v.* WESTERN NUCLEAR, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 87-645. Argued April 27, 1988—Decided June 15, 1988

Section 161(v) of the Atomic Energy Act of 1954 authorizes the Department of Energy (DOE) to offer its services, for a fee, to convert natural uranium into the enriched uranium used for fuel in commercial reactors, and provides that DOE "shall" restrict its enrichment of foreign-source uranium intended for use in domestic facilities "to the extent necessary to assure the maintenance of a viable domestic uranium industry." DOE has determined that the domestic uranium industry has not been "viable" since 1983, and that the imposition of restrictions on DOE's enrichment of foreign uranium would not assure viability. Respondent domestic uranium mining and milling companies filed suit against petitioners (DOE and some of its officers and employees) in Federal District Court, alleging that DOE's failure to impose restrictions on the enrichment of foreign uranium for use in domestic facilities constituted a violation of § 161(v). Respondents moved for summary judgment based on this claim, arguing that two facts—that the domestic industry was not viable and that DOE imposed no restrictions on enrichment of foreign uranium—established their entitlement to judgment as a matter of law under § 161(v). Petitioners filed a cross-motion for summary judgment, contending that § 161(v) did not require restrictions when those restrictions would not serve the statutory goal of assuring the maintenance of a viable domestic industry. The court entered summary judgment for respondents, holding that the statute gave DOE no discretion to determine not to impose restrictions if the domestic industry was not viable. The Court of Appeals affirmed the judgment in relevant part.

Held: Section 161(v) does not require DOE to restrict the enrichment of foreign uranium where such restriction would not achieve the statutory goal of "assur[ing] the maintenance of a viable domestic uranium industry," for the statute ties the amount of restriction to be imposed to the achievement of that goal. Pp. 671–674.

825 F. 2d 1430, reversed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Deputy Solicitor General Merrill argued the cause for petitioners. With him on the briefs were *Solicitor General*

Fried, Acting Assistant Attorney General Spears, John Harrison, Leonard Schaitman, Richard A. Olderman, Eric J. Fygi, Marc Johnston, and *Acting Solicitor General Wallace.*

Peter J. Nickles argued the cause for respondents. With him on the brief were *William H. Allen, Elliott Schulder, Alan A. Pemberton, Harley W. Shaver,* and *John H. Licht.**

JUSTICE BLACKMUN delivered the opinion of the Court.

Section 161(v) of the Atomic Energy Act of 1954, as amended, 78 Stat. 606, 42 U. S. C. §2201(v), provides that the Department of Energy (DOE) shall restrict its enrichment of foreign-source uranium intended for use in domestic facilities "to the extent necessary to assure the maintenance of a viable domestic uranium industry." DOE has determined that the domestic uranium industry has not been "viable"[1] since 1983, and that the imposition of restrictions on the enrichment of foreign uranium would not assure viability. In this case we consider whether § 161(v) requires DOE to restrict the enrichment of foreign uranium, irrespective of whether such restriction would make the domestic industry viable. We conclude that it does not.

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*Briefs of *amici curiae* urging reversal were filed for the Government of Australia by *Mark R. Joelson* and *Joseph P. Griffin;* for the Government of Canada by *Douglas E. Rosenthal;* for Eldorado Nuclear Limited et al. by *Robert E. Herzstein;* and for Electric Utility Companies by *Harry H. Voigt* and *Paul H. Falon.*

Briefs of *amici curiae* urging affirmance were filed for United States Senators Jeff Bingaman et al. by *Senator Pete V. Domenici;* and for the State of Arizona et al. by *Joseph B. Meyer,* Attorney General of Wyoming, and *Mary B. Guthrie,* Senior Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Robert K. Corbin* of Arizona, *Duane Woodard* of Colorado, *Hal Stratton* of New Mexico, *Brian McKay* of Nevada, and *David L. Wilkerson* of Utah.

Charles H. Montange filed a brief for the National Taxpayers Union as *amicus curiae.*

[1] A purist might regard the word "viable" as misused in this context. It nevertheless appears in the statute and therefore, inescapably, it and its variants are used throughout this opinion. See H. Fowler, Modern English Usage 679 (2d ed. 1965); W. Follett, Modern American Usage 344–345 (1966).

I

In 1964, as part of its efforts to move the nuclear-power industry into the private sector, Congress enacted the Private Ownership of Special Nuclear Materials Act (Act), Pub. L. 88–489, 78 Stat. 602, which amended the Atomic Energy Act of 1954 to permit privately owned utilities operating nuclear reactors also to own, for the first time, the uranium used for fuel in their reactors. At the time of the statute's enactment, DOE's predecessor, the Atomic Energy Commission (AEC), was the only entity in the world with the facilities to convert natural uranium into the enriched uranium used for fuel in commercial reactors.[2] In § 161(v), Congress accounted for this *de facto* monopoly by authorizing the AEC to offer "toll enrichment" services whereby utilities could obtain unenriched uranium on the open market and have it enriched by the AEC for a fee. It was to protect the uranium mining and milling industry from foreign competition during the period of transition from a Government-controlled market to an open one, that Congress included in § 161(v) the requirement that the AEC, in written "criteria," restrict its enrichment of foreign-source uranium for domestic use "to the extent necessary to assure the maintenance of a viable domestic uranium industry."[3]

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[2] "Enrichment," in this context, refers to the process whereby the proportion of the fissionable isotope U–235 is increased from approximately 1% to approximately 3%. Natural, unenriched, uranium cannot be used to produce commercial electric power.

[3] The relevant portion of § 161(v) states that the AEC is authorized to offer toll enrichment services provided:

> "That the Commission, to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States. The Commission shall establish criteria in writing setting forth the terms

The criteria initially established by the AEC provided that it would enrich no foreign-source uranium for domestic use. See 31 Fed. Reg. 16479 (1966). In 1974, expecting an increase in the demand for uranium to match the anticipated expansion in the commercial use of nuclear power, the AEC amended the criteria and provided for the gradual elimination by the end of 1983 of restrictions on its enrichment of foreign-source uranium for domestic use. See 39 Fed. Reg. 38016 (1974). The phase-out took place according to schedule, and DOE, which has replaced AEC for these purposes,[4] has not reimposed restrictions on the enrichment of foreign uranium.

The early optimistic forecast for the commercial use of nuclear power turned gloomy in the late 1970's and early 1980's, and the economic condition of the domestic uranium industry deteriorated. Cancellations and delays in the construction of nuclear reactors led to a drop in the demand for uranium, which, in turn, brought about a precipitous decline in the

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and conditions under which services provided under this subsection shall be made available including the extent to which such services will be made available for source or special nuclear material of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States: *Provided*, That before the Commission establishes such criteria, the proposed criteria shall be submitted to the Joint Committee [on Atomic Energy], and a period of forty-five days shall elapse while Congress is in session . . . unless the Joint Committee by resolution in writing waives the conditions of, or all or any portion of, such forty-five-day period." 42 U. S. C. § 2201(v).

[4] In 1974, Congress enacted the Energy Reorganization Act of 1974, 88 Stat. 1233, as amended, 42 U. S. C. § 5801 *et seq.*, which abolished the AEC. See § 5814(a). The functions of the AEC were divided between two regulatory bodies. Its "licensing and related regulatory functions" were transferred to the Nuclear Regulatory Commission. § 5841(f). All other functions, including the enrichment-services program, were transferred to the Energy and Research and Development Administration, § 5814(c), which later became DOE, see §§ 301 and 703 of Department of Energy Organization Act, 91 Stat. 577, 606, 42 U. S. C. §§ 7151(a) and 7293.

price of uranium ore.[5] The decline of the domestic uranium industry has also been attributed to other developments in the national and international markets. DOE lost its enrichment monopoly when two European consortia and the Soviet Union began to supply enriched uranium produced from foreign-source ore. See 51 Fed. Reg. 3625 (1986). This allowed foreign uranium suppliers, who offered lower prices, to compete successfully with domestic suppliers for the business of the domestic utilities. Another competitive alternative was the emergence of a secondary market in which domestic utilities, bound by long-term contracts to purchase enrichment services in excess of their needs, sold their enriched uranium to other utilities at substantial discounts. *Ibid.*

In 1983, § 170B was added to the Atomic Energy Act of 1954 to improve Congress' ability to monitor the domestic uranium industry's condition. 96 Stat. 2081, 42 U. S. C. § 2210b. This new provision required the Secretary of Energy to promulgate criteria for assessing the viability of the industry and to report to the President and the Congress annually on the industry's viability. DOE accordingly issued criteria, still in effect, see 10 CFR pt. 761 (1988), which define viability largely in terms of "the extent to which the domestic mining and milling uranium industry will be capable, at any particular time, of supplying the needs of the domestic nuclear power industry under a variety of hypothetical conditions." 48 Fed. Reg. 45747 (1983). Applying these criteria, DOE reported that the industry was viable in 1983, but that one year later it was no longer viable. See S. Rep. No. 100–214, p. 9 (1987) (noting no change in viability in 1985 and no change in prospect for industry's viability in 1986).

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[5] Between 1979 and 1986, the market price of uranium dropped from $43.25 per pound to $17.00 per pound, which an industry report suggests is well below the conventional United States producers' average cost of production. See Status of the Domestic Uranium Mining and Milling Industry: The Effects of Imports, Hearing before the Subcommittee on Energy Research and Development of the Senate Committee on Energy and Natural Resources, 97th Cong., 1st Sess., 148 (1981) (statement of Edison Electric Institute reporting drop from 1979 to 1981); 51 Fed. Reg. 27136, n. 12 (1986) (reporting 1986 price). Apparently the market price has remained low. See Weekly Metals Prices, Financial Times, June 8, 1988, p. 34, col. 1 (London ed.) (reporting price of $15.75 per pound).

Shortly after the Secretary first reported that the industry was not viable, he initiated a rulemaking to consider revising the criteria governing DOE's restriction of enrichment services. 51 Fed. Reg. 3624–3632 (1986). In his notice of proposed rulemaking, the Secretary specifically stated that, despite the depressed condition of the domestic industry, he proposed not to restrict the enrichment of foreign uranium because "[i]mport restrictions on foreign uranium would not assure the viability of the domestic mining and milling industry." *Id.*, at 3627.

After receiving extensive comments, the Secretary adopted final revised criteria that again did not include any restrictions on enrichment. See 10 CFR pt. 762 (1988). In response to critical comments from the domestic uranium industry, the Secretary explained: "The plain language of the statute makes clear that restrictions are not to be imposed automatically if the domestic industry is non-viable, but only if they are needed to, and in fact, will assure the maintenance of a viable domestic uranium industry." 51 Fed. Reg. 27134 (1986). Finding that the domestic industry's problems were due to "[s]tructural weaknesses," particularly the collapse in demand and the consequent inability of the market to sustain a price for uranium that enabled the industry to recover its cost of production, the Secretary concluded that restrictions on enrichment would do nothing to cure those ills. *Id.*, at 27135. Moreover, the Secretary found that, because DOE had no market power with respect to the provision of enrichment services, it could not force its enrichment customers to use domestic uranium. *Id.*, at 27138. The Secretary repeated his earlier conclusion that restrictions on enrichment services "would not assure the viability of the domestic mining and milling industry," *id.*, at 27135, and, if anything, would be "counterproductive," because such restrictions would send some customers away, requiring DOE to impose heavier costs on the remaining domestic suppliers. *Id.*, at 27136.

Before the Secretary had concluded that the industry was not viable, and before he had initiated this latest rulemaking, respondents, three domestic uranium mining and milling companies, filed suit in the United States District Court for the District of Colorado against DOE and some of its officers and employees, petitioners here.[6] Respondents alleged, among other things, that DOE's failure to impose restrictions on the enrichment of foreign uranium for use in domestic facilities constituted a violation of § 161(v). App. 10–15. Respondents moved for summary judgment based on this claim,[7] arguing that two facts—that the domestic industry was not viable and that DOE imposed no restrictions on enrichment of foreign uranium—sufficed to establish their entitlement to judgment as a matter of law under § 161(v). App. 27–28. Accepting respondents' two facts, DOE submitted a cross-motion for summary judgment, arguing that § 161(v) did not require restrictions when those restrictions would not serve the statutory goal of assuring the maintenance of a viable domestic industry. App. 39.

The District Court entered summary judgment for respondents. App. to Pet. for Cert. 22a. According to the court, the statute gave DOE no discretion to determine not to impose restrictions if the domestic industry was not viable. In view of its determination that immediate injunctive relief was necessary to remedy DOE's "continuing refusal to recognize its obligations under 42 U. S. C. § 2201(v)," *id.*, at 22a–23a, the District Court entered an order requiring DOE to limit its enrichment of foreign uranium for domestic use to 25% of all material enriched between June 6 and December 31, 1986; imposing a total ban on enrichment of foreign uranium beginning January 1, 1987, and "continuing until the viability of the domestic uranium industry is assured"; and calling for a rulemaking to be commenced to determine whether "criteria less restrictive than those imposed by this order would assure the maintenance of a viable domestic uranium industry." *Id.*, at 23a.

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[6] Petitioners are John S. Herrington, the Secretary of Energy; F. Clark Huffman, Sherry E. Peske, Philip G. Sewell, James W. Vaughn, and Joseph F. Salgado, officers or employees of DOE sued in their official capacities; and DOE itself. For convenience, petitioners are referred to collectively as DOE.

[7] In this motion, respondents also sought summary judgment on their claim that the criteria that DOE promulgated pursuant to § 170B to assess viability were "fatally flawed." App. 27. Respondents later sought leave to withdraw this portion of their motion without prejudice. This request was granted by the District Court. App. to Pet. for Cert. 24a.

DOE appealed to the United States Court of Appeals for the Tenth Circuit.[8] That court affirmed the District Court's judgment in relevant part. 825 F. 2d 1430 (1987). The Court of Appeals found the language of § 161(v) unambiguous: The term "shall" indicated that the restrictions were mandatory, and the phrase "to the extent necessary to assure the maintenance of a viable domestic uranium industry" indicated that DOE had discretion to "determine how much restriction is required to assure viability, but it cannot decide not to impose restrictions when the industry is not viable." 825 F. 2d, at 1439. According to the Court of Appeals, the statute clearly instructs that

> "when domestic nonviability is determined, restrictions on enrichment of foreign-source uranium must be imposed and must become increasingly aggressive, to the point of 100% restriction, until the domestic industry is rejuvenated and becomes viable." *Ibid.*

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[8] While the appeal was pending, Congress adopted a joint resolution for continuing appropriations to provide funding for DOE and other agencies. 100 Stat. 1783. Section 305 of the resolution expressly authorizes DOE to enrich foreign uranium until the present litigation is brought to final judgment. 100 Stat. 1783–210.

At DOE's request, the Court of Appeals stayed its mandate pending this Court's final disposition of DOE's petition for certiorari. App. 4. We granted the writ. 484 U. S. 1003 (1988).

II

We begin by emphasizing that the question presented here is a narrow one which comes to us as a challenge to the entry of summary judgment. That judgment rests on a legal conclusion drawn from two uncontested facts: that the domestic uranium industry was not viable, and that DOE was imposing no restrictions on the enrichment of foreign-source uranium for use in domestic facilities. On the basis of these facts alone, the courts below determined that DOE was violating the law, for they read § 161(v) "to require the DOE to restrict enrichment of foreign uranium whenever the domestic industry is not viable—whether or not such restriction would result in successful resuscitation of the uranium industry." 825 F. 2d, at 1437. Therefore, neither DOE's underlying assessment that the industry was not viable, nor its assessment that no amount of restriction would assure the industry's viability, nor, indeed, what it means to "assure the maintenance of a viable . . . industry" are before us at this time for review. The only question presented is whether, regardless of the effects restrictions would have on the viability of the domestic industry, DOE *must* impose restrictions on the enrichment of foreign-source uranium whenever the domestic industry is determined not to be viable.

In considering this narrow question of statutory interpretation, we cannot agree with the Court of Appeals' conclusion that the relevant language in § 161(v) is unambiguous. While respondents' reading of the statute is not implausible, it is by no means the only reading the language can bear. The statute requires DOE to impose restrictions "to the extent necessary to assure the maintenance of a viable domestic uranium industry." If some amount of restriction would assure a viable domestic industry, there can be no doubt that DOE is *required* to impose restrictions. The term "shall" makes clear that, in such circumstances, DOE has no discretion to decline to impose restrictions. But whether that mandate applies when restrictions would not assure viability is not directly addressed by the language of the statute. Indeed, we well might infer from the language that the particular issue presented by this case was not the focus of Congress' concern at the time the relevant provision was enacted. We therefore look to Congress' express purpose in imposing restriction requirements to determine whether they apply here.

The purpose of the relevant provision could not be articulated more clearly in the statutory language. See *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes"). Congress imposed restriction obligations on DOE to satisfy a single goal: "to assure the maintenance of a viable domestic uranium industry."

Both parties agree that this is the clear purpose behind the provision, but they put it to different uses. Respondents contend that the statute reveals that Congress made a policy determination that imposing restrictions on the enrichment of foreign-source uranium could *always* assure the viability of the domestic industry and therefore commanded DOE to impose some restrictions whenever the industry's viability was threatened or destroyed. Respondents suggest that DOE's refusal to impose restrictions under the circumstances presented in this case simply reflects DOE's disagreement with Congress' policy judgment. See also 825 F. 2d, at 1439 ("DOE's argument that this policy is not wise in the present uranium market should be made to Congress and not to the courts").

DOE, in contrast, asserts that the clear congressional purpose defines the proper limit of DOE's obligation: DOE is required to impose restrictions to the extent necessary to serve a particular goal, and if *no* extent will serve that goal, then DOE does not violate the statute by declining to impose restrictions. Indeed, DOE suggests, to impose restrictions it knew were incapable of serving the statutory goal would, in fact, be to act outside its authority.

DOE's reading strikes us as the more natural one.[9] While the parties, on remand, can argue over whether DOE properly determined that no amount of restriction would assure viability, and, indeed, what it means to assure viability, it seems strained to assert that, even if DOE properly determined that no amount of restriction would assure the viability of the industry, Congress nevertheless intended DOE to impose restrictions that were somehow calculated to serve that unattainable goal.[10] Indeed, it is impossible to ascertain from the statute how DOE would calculate the extent of restriction to be imposed under respondents' interpretation of the statute. The only guidepost DOE has is the amount necessary to assure the viability of the domestic industry. See 825 F. 2d, at 1438 (interpreting the phrase "to the extent necessary to assure the maintenance of a viable domestic industry" as "inform[ing] the DOE of the *amount* of restriction required") (emphasis in original). Where DOE determines that no such amount exists, it is without guidance in setting restrictions. The determination of the courts below that DOE was barred from enriching *any* foreign-source uranium rests on the assumption that the greater the restrictions, the more assured is the domestic industry's viability. This assumption cannot be grounded in the statutory language and, indeed, for the purpose of this case's summary judgment status, we must accept DOE's assertion that the assumption is false.

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[9] In addition to arguing that its interpretation of § 161(v) is more reasonable, DOE maintains that, even if the two interpretations are equally reasonable, its interpretation is entitled to deference as a "permissible construction" of a statute by the agency charged with the statute's administration. See *Young* v. *Community Nutrition Institute*, 476 U. S. 974, 980 (1986), quoting *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984). Although respondents contend that DOE's interpretation of § 161(v) has not been consistent over the years and is therefore not entitled to deference, see Brief for Respondents 34, it is unclear whether DOE articulated, in advance of this litigation, *any* interpretation of the statute's application to the facts presented here. On July 29, 1986, more than one month after the District Court had issued its order granting summary judgment, DOE issued a final rulemaking, stating that it would continue to refuse to impose enrichment restrictions "in order [in part] to formally record DOE's interpretation of section 161(v)." 51 Fed. Reg. 27134, n. 4 (1986). Because we agree that DOE's reading of § 161(v) is the more plausible one, we need not consider whether the manner in which DOE has articulated its interpretation should affect the degree of deference it warrants. Cf. *Securities Industry Assn.* v. *Board of Governors, FRS*, 468 U. S. 137, 143–144 (1984) (Board counsel's *post hoc* rationalizations for agency action entitled to little deference).

[10] Of course, DOE would be in a different position if Congress expressly had required that restrictions be imposed whenever the industry was not viable without tying the extent of restrictions to be imposed to the achievement of a stated purpose. Were DOE governed by such a statute, its dis-

III

Because we conclude that Congress did not intend to force DOE to impose enrichment restrictions where such restrictions would not achieve the statutory goal they were intended to achieve, the judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.[11]

It is so ordered.

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agreement with the wisdom of the requirement would not give DOE the discretion to ignore it.

[11] While DOE styled its response to respondents' motion for summary judgment as a cross-motion for summary judgment as well as a memorandum in opposition, see App. 39, DOE's successful opposition to respondents' motion is insufficient to establish that it is entitled to summary judgment in its favor. All we have resolved here is that the industry's nonviability does not necessarily trigger an obligation to impose enrichment restrictions. Whether DOE, in fact, has violated § 161(v) by failing to impose restrictions is a question to be addressed, in the first instance, on remand after an opportunity for presentation of further evidence and further briefing.

ARIZONA v. ROBERSON

CERTIORARI TO THE COURT OF APPEALS OF ARIZONA

No. 87-354. Argued March 29, 1988—Decided June 15, 1988

Edwards v. *Arizona*, 451 U. S. 477, 484-485, held that a suspect who has "expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication." After being arrested at the scene of a burglary, and being advised by the arresting officer of his constitutional rights, as declared in *Miranda* v. *Arizona*, 384 U. S. 436, to remain silent and to have an attorney present during any interrogation, respondent replied that he "wanted a lawyer before answering any questions," which fact was duly reported in the officer's written report. Three days later, while respondent was still in custody, a different officer, unaware that respondent had earlier requested counsel who had not yet been provided, advised him of his rights and interrogated him about a different burglary, obtaining an incriminating statement concerning that crime. In the prosecution for that offense, the Arizona trial court suppressed the statement in reliance upon a State Supreme Court decision that refused to distinguish *Edwards* with respect to a suspect who was reinterrogated about an unrelated offense after he had requested counsel, ruling that the fact that the further interrogation in *Edwards* had involved the same offense was not legally significant for Fifth Amendment purposes. The Arizona Court of Appeals affirmed the suppression.

Held: The *Edwards* rule applies to bar police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation. Pp. 680-688.

(a) The bright-line, prophylactic *Edwards* rule benefits the accused and the State alike. It protects against the inherently compelling pressures of custodial interrogation suspects who feel incapable of undergoing such questioning without the advice of counsel, by creating a presumption that any subsequent waiver of the right to counsel at the authorities' behest was coercive and not purely voluntary. Moreover, it provides clear and unequivocal guidelines that inform police and prosecutors with specificity what they may do in conducting custodial interrogation, and that inform courts under what circumstances statements obtained during such interrogation are not admissible. Pp. 680-682.

(b) This Court's decisions do not compel an exception to *Edwards* for postrequest police-initiated custodial interrogation relating to a separate investigation. *Michigan* v. *Mosley*, 423 U. S. 96; *Connecticut* v. *Barrett*, 479 U. S. 523; *Colorado* v. *Spring*, 479 U. S. 564; and *Maine* v. *Moulton*, 474 U. S. 159, distinguished. Pp. 682–685.

(c) The nature and factual setting of this case do not compel an exception to the *Edwards* rule. The argument that the existence of separate investigations in itself precludes the type of badgering that led to the decision in *Edwards* is not persuasive. It is by no means clear that police engaged in separate investigations will be any less eager than police involved in only one inquiry to question a suspect in custody. Moreover, to a suspect who has indicated his inability to cope with custodial interrogation by requesting counsel, any further interrogation without counsel will surely exacerbate whatever compulsion to speak the suspect may be feeling. The giving of fresh sets of *Miranda* warnings will not necessarily "reassure" a suspect who has been denied requested counsel that his rights have remained untrammeled. In fact, in a case such as this, in which three days elapsed between the unsatisfied request for counsel and the separate-offense interrogation, there is a serious risk that the mere repetition of the warnings would not overcome the presumption of coercion created by prolonged police custody. Furthermore, the fact that it may be in an uncounseled suspect's interests to know about, and give a statement concerning, the separate offense does not compel an exception to *Edwards*, since the suspect, having requested counsel, can determine how to deal with the separate investigations with counsel's advice, and since the police are free to inform the suspect of the facts of the second investigation, as long as they do not interrogate him, and he is free to initiate further communication. Finally, the fact that the officer who conducted respondent's second interrogation did not know that he had requested counsel cannot justify the failure to honor that request, since *Edwards* focuses on the state of mind of the suspect and not of the police, and since the officer could have discovered the request simply by reading the arresting officer's report. Pp. 685–688.

Affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, and SCALIA, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 688. O'CONNOR, J., took no part in the consideration or decision of the case.

Bruce M. Ferg, Assistant Attorney General of Arizona, argued the cause for petitioner. With him on the briefs were

Robert K. Corbin, Attorney General, and *William J. Schafer III.*

Paul J. Larkin, Jr., argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Fried, Assistant Attorney General Weld, Deputy Solicitor General Bryson, Harriet S. Shapiro,* and *Joel M. Gershowitz.*

Robert L. Barrasso, by appointment of the Court, 484 U. S. 1024, argued the cause and filed a brief for respondent.*

JUSTICE STEVENS delivered the opinion of the Court.

In *Edwards* v. *Arizona*, 451 U. S. 477, 484–485 (1981), we held that a suspect who has "expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." In this case Arizona asks us to craft an exception to that rule for cases in which the police want to interrogate a suspect about an offense that is unrelated to the subject of their initial interrogation. Several years ago the Arizona Supreme Court considered, and rejected, a similar argument, stating:

> "The only difference between Edwards and the appellant is that Edwards was questioned about the same of-

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* Briefs of *amici curiae* urging reversal were filed for the State of Indiana et al. by *Linley E. Pearson*, Attorney General of Indiana, and *William E. Daily* and *Michael Gene Worden*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Duane Woodard* of Colorado, *Jim Smith* of Florida, *Jim Jones* of Idaho, *Frederick J. Cowan* of Kentucky, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Mike Greely* of Montana, *Lacy H. Thornburg* of North Carolina, *Roger Tellinghuisen* of South Dakota, *Mary Sue Terry* of Virginia, *Charlie Brown* of West Virginia, and *Archie G. McClintock* of Wyoming; and for Americans for Effective Law Enforcement, Inc., et al. by *David Crump, Courtney A. Evans, Bernard J. Farber, Daniel B. Hales, Jack E. Yelverton, Fred E. Inbau, Wayne W. Schmidt,* and *James P. Manak.*

> fense after a request for counsel while the appellant was reinterrogated about an unrelated offense. We do not believe that this factual distinction holds any legal significance for fifth amendment purposes." *State* v. *Routhier*, 137 Ariz. 90, 97, 669 P. 2d 68, 75 (1983), cert. denied, 464 U. S. 1073 (1984).

We agree with the Arizona Supreme Court's conclusion.

I

On April 16, 1985, respondent was arrested at the scene of a just-completed burglary. The arresting officer advised him that he had a constitutional right to remain silent and also the right to have an attorney present during any interrogation. See *Miranda* v. *Arizona*, 384 U. S. 436, 467–479 (1966). Respondent replied that he "wanted a lawyer before answering any questions."[1] This fact was duly recorded in the officer's written report of the incident. In due course, respondent was convicted of the April 16, 1985, burglary.

On April 19, 1985, while respondent was still in custody pursuant to the arrest three days earlier, a different officer interrogated him about a different burglary that had occurred on April 15. That officer was not aware of the fact that respondent had requested the assistance of counsel three days earlier. After advising respondent of his rights, the officer obtained an incriminating statement concerning the April 15 burglary. In the prosecution for that offense, the trial court suppressed that statement. In explaining his ruling, the trial judge relied squarely on the Arizona Supreme Court's opinion in *State* v. *Routhier*, 137 Ariz., at 97, 669 P. 2d, at 75, characterizing the rule of the *Edwards* case as "clear and unequivocal."[2]

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[1] Tr. 26 (Apr. 3, 1986).

[2] "Routhier was based on Edwards versus Arizona which held that once the defendant has invoked his right to counsel, he may not be re-

The Arizona Court of Appeals affirmed the suppression order in a brief opinion, stating:

> "In *Routhier*, as in the instant case, the accused was continuously in police custody from the time of asserting his Fifth Amendment right through the time of the impermissible questioning. The coercive environment never dissipated." App. to Pet. for Cert. 24.

The Arizona Supreme Court denied a petition for review. *Id.*, at 25. We granted certiorari to resolve a conflict with certain other state court decisions.[3] 484 U. S. 975 (1987). We now affirm.

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interrogated unless counsel has been made available to him or he initiates the conversation.

"The Routhier court states that whether the defendant is re-interrogated about the same offense or an unrelated offense makes no difference for Fifth Amendment purposes.

"The Routhier court further stated that Edwards is clear and unequivocal, there is to be no further interrogation by authorities once the right to counsel is invoked. The Court in that case finding that the assertion of the right to counsel is an assertion by the accused that he is not competent to deal with authorities without legal advice. And that the resumption of questioning by the police without the requested attorney being provided, strongly suggests to the accused that he has no choice but to answer." App. to Pet. for Cert. 15–16.

[3] See *State* v. *Dampier*, 314 N. C. 292, 333 S. E. 2d 230 (1985) (*Edwards* inapplicable to interrogation by authorities from different State concerning unrelated matter); *McFadden* v. *Commonwealth*, 225 Va. 103, 300 S. E. 2d 924 (1983) (*Edwards* inapplicable when authorities from different county question suspect about different crime); see also *Lofton* v. *State*, 471 So. 2d 665 (Fla. App.) (no *Edwards* violation when suspect is represented by attorney in unrelated matter, then questioned without counsel present), review denied, 480 So. 2d 1294 (Fla. 1985); *State* v. *Newton*, 682 P. 2d 295 (Utah 1984) (same); *State* v. *Cornethan*, 38 Wash. App. 231, 684 P. 2d 1355 (1984) (alternative holding: *Edwards* inapplicable to interrogation in unrelated investigation; court also holds that representation by attorney in unrelated matter does not suffice as request for counsel for *Edwards* purposes); cf. *State* v. *Harriman*, 434 So. 2d 551 (La. App.) (adopts petitioner's view here, but only after holding that suspect had initiated conversation regarding second investigation), writ denied, 440 So. 2d 729 (La.

II

A major purpose of the Court's opinion in *Miranda* v. *Arizona*, 384 U. S., at 441–442, was "to give concrete constitutional guidelines for law enforcement agencies and courts to follow." "As we have stressed on numerous occasions, '[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application. *Berkemer* v. *McCarty*, 468 U. S. 420, 430 (1984); see also *New York* v. *Quarles*, [467 U. S. 649, 662–664 (1984)] (concurring opinion); *Fare* v. *Michael C.*, 442 U. S. [707, 718 (1979)]." *Moran* v. *Burbine*, 475 U. S. 412, 425 (1986).

The rule of the *Edwards* case came as a corollary to *Miranda*'s admonition that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 U. S., at 474. In such an instance, we had concluded in *Miranda*, "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.*, at 475. In *Edwards*, we "reconfirm[ed] these views and, to lend them substance, emphasize[d] that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." 451 U. S., at 485. We concluded that reinterrogation may only occur if "the accused himself initiates

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1983); but see *United States ex rel. Espinoza* v. *Fairman*, 813 F. 2d 117, 124–126 (CA7) (same rule as Arizona), cert. denied, 483 U. S. 1010 (1987); *Luman* v. *State*, 447 So. 2d 428 (Fla. App. 1984) (same); *Radovsky* v. *State*, 296 Md. 386, 464 A. 2d 239 (1983) (same); see also *Boles* v. *Foltz*, 816 F. 2d 1132, 1137–1141 (CA6) (Gibson, J., dissenting) (same; majority does not reach issue), cert. denied, 484 U. S. 857 (1987); cf. *United States* v. *Scalf*, 708 F. 2d 1540, 1544 (CA10 1983) (knowledge of request for counsel "is imputed to all law enforcement officers who subsequently deal with the suspect"); *State* v. *Arceneaux*, 425 So. 2d 740 (La. 1983) (same).

further communication, exchanges, or conversations with the police." *Ibid.* Thus, the prophylactic protections that the *Miranda* warnings provide to counteract the "inherently compelling pressures" of custodial interrogation and to "permit a full opportunity to exercise the privilege against self-incrimination," 384 U. S., at 467, are implemented by the application of the *Edwards* corollary that if a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the "inherently compelling pressures" and not the purely voluntary choice of the suspect. As JUSTICE WHITE has explained, "the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." *Michigan* v. *Mosley*, 423 U. S. 96, 110, n. 2 (1975) (concurring in result).

We have repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards* as well as *Miranda.* See *Michigan* v. *Jackson*, 475 U. S. 625, 634 (1986); *Smith* v. *Illinois*, 469 U. S. 91, 98 (1984) *(per curiam); Solem* v. *Stumes*, 465 U. S. 638, 646 (1984); see also *Shea* v. *Louisiana*, 470 U. S. 51 (1985); *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1044 (1983) (plurality opinion) (REHNQUIST, J.). In *Fare* v. *Michael C.*, 442 U. S. 707, 718 (1979), we explained that the "relatively rigid requirement that interrogation must cease upon the accused's request for an attorney . . . has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis."[4] The *Edwards* rule thus serves the purpose of providing "clear and unequivocal" guidelines to the law enforcement profession. Surely there is nothing ambiguous about the requirement that after a person in custody has expressed his desire to deal with the police only through counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U. S., at 484–485.

III

Petitioner contends that the bright-line, prophylactic *Edwards* rule should not apply when the police-initiated interrogation following a suspect's request for counsel occurs in the context of a separate investigation. According to petitioner, both our cases and the nature of the factual setting compel this distinction. We are unpersuaded.

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[4] It is significant that our explanation of the basis for the "*per se* aspect of *Miranda*" in *Fare* v. *Michael C.*, 442 U. S., at 719, applies to the application of the *Edwards* rule in a case such as this. As we stated in *Fare:*

"The rule in *Miranda* . . . was based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the Court found that 'the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system' established by the Court. [384 U. S.], at 469. Moreover, the lawyer's presence helps guard against overreaching by the police and ensures that any statements actually obtained are accurately transcribed for presentation into evidence. *Id.*, at 470.

"The *per se* aspect of *Miranda* was thus based on the unique role the lawyer plays in the adversary system of criminal justice in this country." 442 U. S., at 719.

Petitioner points to our holding in *Michigan* v. *Mosley*, 423 U. S., at 103–104 (quoting *Miranda* v. *Arizona*, 384 U. S., at 479), that when a suspect asserts his right to cut off questioning, the police may "'scrupulously honor'" that right by "immediately ceas[ing] the interrogation, resum[ing] questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restrict[ing] the second interrogation to a crime that had not been a subject of the earlier interrogation." 423 U. S., at 106. The police in this case followed precisely that course, claims the State. However, as *Mosley* made clear, a suspect's decision to cut off questioning, unlike his request for counsel, does not raise the presumption that he is unable to proceed without a lawyer's advice. See *id.*, at 101, n. 7; *id.*, at 110, n. 2 (WHITE, J., concurring in result), quoted *supra*, at 681.

Petitioner points as well to *Connecticut* v. *Barrett*, 479 U. S. 523, 525 (1987), which concerned a suspect who had "told the officers that he would not give a written statement unless his attorney was present but had 'no problem' talking about the incident." We held that this was a limited request for counsel, that Barrett himself had drawn a distinction between oral and written statements and thus that the officers could continue to question him. Petitioner argues that Roberson's request for counsel was similarly limited, this time to the investigation pursuant to which the request was made. This argument is flawed both factually and legally. As a matter of fact, according to the initial police report, respondent stated that "he wanted a lawyer before answering *any* questions."[5] As a matter of law, the presumption raised by a suspect's request for counsel—that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance—does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation.

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[5] Tr. 26 (Apr. 3, 1986) (emphasis added); see *id.*, at 23; Tr. 12 (Oct. 17, 1985, a.m.).

That a suspect's request for counsel should apply to any questions the police wish to pose follows, we think, not only from *Edwards* and *Miranda*, but also from a case decided the same day as *Barrett*. In *Colorado* v. *Spring*, 479 U. S. 564, 577 (1987), we held that "a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." In the face of the warning that anything he said could be used as evidence against him, Spring's willingness to answer questions, without limiting such a waiver, see *Connecticut* v. *Barrett*, *supra*, indicated that he felt comfortable enough with the pressures of custodial interrogation both to answer questions and to do so without an attorney. Since there is "no qualification of [the] broad and explicit warning" that "*anything* [a suspect] says may be used against him," 479 U. S., at 577 (emphasis in original), Spring's decision to talk was properly considered to be equally unqualified. Conversely, Roberson's unwillingness to answer any questions without the advice of counsel, without limiting his request for counsel, indicated that he did not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney. This discomfort is precisely the state of mind that *Edwards* presumes to persist unless the suspect himself initiates further conversation about the investigation; unless he otherwise states, see *Connecticut* v. *Barrett*, *supra*, there is no reason to assume that a suspect's state of mind is in any way investigation-specific, see *Colorado* v. *Spring*, *supra*.

Finally, petitioner raises the case of *Maine* v. *Moulton*, 474 U. S. 159, 161 (1985), which held that Moulton's "Sixth Amendment right to the assistance of counsel was violated by the admission at trial of incriminating statements made by him to his codefendant, a secret government informant, after indictment and at a meeting of the two to plan defense strategy for the upcoming trial." That case did not involve any

Miranda issue because Moulton was not in custody. In our opinion, we rejected an argument that the statements should be admissible because the police were seeking information regarding both the crime for which Moulton had already been indicted, and a separate, inchoate scheme. Following *Massiah* v. *United States*, 377 U. S. 201, 207 (1964), we recognized, though, that the continuing investigation of uncharged offenses did not violate the defendant's Sixth Amendment right to the assistance of counsel. Our recognition of that fact, however, surely lends no support to petitioner's argument that in the Fifth Amendment context, "statements about different offenses, developed at different times, by different investigators, in the course of two wholly independent investigations, should not be treated the same." Brief for Petitioner 32. This argument overlooks the difference between the Sixth Amendment right to counsel and the Fifth Amendment right against self-incrimination. The former arises from the fact that the suspect has been formally charged with a particular crime and thus is facing a state apparatus that has been geared up to prosecute him. The latter is protected by the prophylaxis of having an attorney present to counteract the inherent pressures of custodial interrogation, which arise from the fact of such interrogation and exist regardless of the number of crimes under investigation or whether those crimes have resulted in formal charges.

In sum, our cases do not support petitioner's position.

IV

Petitioner's attempts at distinguishing the factual setting here from that in *Edwards* are equally unavailing. Petitioner first relies on the plurality opinion in *Oregon* v. *Bradshaw*, 462 U. S., at 1044 (REHNQUIST, J.), which stated that *Edwards* laid down "a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Ed-*

wards was." Petitioner reasons that "the chances that an accused will be questioned so repeatedly and in such quick succession that it will 'undermine the will' of the person questioned, or will constitute 'badger[ing],' are so minute as not to warrant consideration, if the officers are truly pursuing separate investigations." Brief for Petitioner 16. It is by no means clear, though, that police engaged in separate investigations will be any less eager than police involved in only one inquiry to question a suspect in custody. Further, to a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling. Thus, we also disagree with petitioner's contention that fresh sets of *Miranda* warnings will "reassure" a suspect who has been denied the counsel he has clearly requested that his rights have remained untrammeled. See *ibid.* Especially in a case such as this, in which a period of three days elapsed between the unsatisfied request for counsel and the interrogation about a second offense, there is a serious risk that the mere repetition of the *Miranda* warnings would not overcome the presumption of coercion that is created by prolonged police custody.[6]

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[6] The United States, as *amicus curiae* supporting petitioner, suggests similarly that "respondent's failure to reiterate his request for counsel to [the officer involved in the second investigation], even after [that officer] gave respondent complete *Miranda* warnings, could not have been the result of any doubt on respondent's part that the police would honor a request for counsel if one were made." Brief for United States as *Amicus Curiae* 10. This conclusion is surprising, considering that respondent had not been provided with the attorney he had already requested, despite having been subjected to police-initiated interrogation with respect to the first investigation as well. See n. 7, *infra*. We reiterate here, though, that the "right" to counsel to protect the Fifth Amendment right against self-incrimination is not absolute; that is, "[i]f authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they

The United States, as *amicus curiae* supporting petitioner, suggests that a suspect in custody might have "good reasons for wanting to speak with the police about the offenses involved in the new investigation, or at least to learn from the police what the new investigation is about so that he can decide whether it is in his interest to make a statement about that matter without the assistance of counsel." Brief for United States as *Amicus Curiae* 11. The simple answer is that the suspect, having requested counsel, can determine how to deal with the separate investigations with counsel's advice. Further, even if the police have decided temporarily not to provide counsel, see n. 6, *supra*, they are free to inform the suspect of the facts of the second investigation as long as such communication does not constitute interrogation, see *Rhode Island* v. *Innis*, 446 U. S. 291 (1980). As we have made clear, any "further communication, exchanges, or conversations with the police" that the suspect himself initiates, *Edwards* v. *Arizona*, 451 U. S., at 485, are perfectly valid.

Finally, we attach no significance to the fact that the officer who conducted the second interrogation did not know that respondent had made a request for counsel. In addition to the fact that *Edwards* focuses on the state of mind of the suspect and not of the police, custodial interrogation must be conducted pursuant to established procedures, and those procedures in turn must enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel. In this case respondent's request had been properly memorialized in a written report but the officer who conducted the interrogation simply failed to examine that report. Whether a contemplated reinterrogation concerns the same or a different offense, or whether the same or different law enforcement authorities are involved in the second investigation, the same need to determine

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do not question him during that time." *Miranda* v. *Arizona*, 384 U. S. 436, 474 (1966).

whether the suspect has requested counsel exists.[7] The police department's failure to honor that request cannot be justified by the lack of diligence of a particular officer. Cf. *Giglio* v. *United States*, 405 U. S. 150, 154 (1972).

The judgment of the Arizona Court of Appeals is

Affirmed.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE joins, dissenting.

The majority frames the case as one in which we are asked to "craft an exception" to *Edwards* v. *Arizona*, 451 U. S. 477 (1981). *Ante*, at 677. The implication from this, it would seem, is that the burden of proof falls on those who say no constitutional or preventative purpose is served by prohibiting the police from asking a suspect, once he has requested counsel, if he chooses to waive that right in a new and independent investigation of a different crime. But the rule of *Edwards* is our rule, not a constitutional command; and it is our obligation to justify its expansion. Our justification must be consistent with the practical realities of suspects' rights and police investigations. With all respect, I suggest the majority does not have a convincing case. The majority's rule is not necessary to protect the rights of suspects, and it will in many instances deprive our nationwide law enforcement network of a legitimate investigative technique now routinely used to resolve major crimes.

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[7] Indeed, the facts of this case indicate that different officers investigating the same offense are just as likely to bypass proper procedures as an officer investigating a different offense, inasmuch as the record discloses no less than five violations of the *Edwards* rule, four concerning the April 16 burglary and only one concerning the April 15 burglary. See Tr. 23–24, 49 (Apr. 3, 1986); Tr. 8–12 (Oct. 17, 1985, p.m.). It is only the last violation that is at issue in this case.

When a suspect is in custody for even the most minor offense, his name and fingerprints are checked against master files. It is a frequent occurrence that the suspect is wanted for questioning with respect to crimes unrelated to the one for which he has been apprehended. The rule announced today will bar law enforcement officials, even those from some other city or other jurisdiction, from questioning a suspect about an unrelated matter if he is in custody and has requested counsel to assist in answering questions put to him about the crime for which he was arrested.

This is the first case in which we are asked to apply *Edwards* to separate and independent investigations. The statements deemed inadmissible in *Edwards* and in our later cases applying its doctrine were statements relating to the same investigation in which the right to counsel was invoked. See *Connecticut* v. *Barrett*, 479 U. S. 523 (1987); *Smith* v. *Illinois*, 469 U. S. 91 (1984); *Solem* v. *Stumes*, 465 U. S. 638 (1984); *Oregon* v. *Bradshaw*, 462 U. S. 1039 (1983); *Wyrick* v. *Fields*, 459 U. S. 42 (1982). The majority's extension of the *Edwards* rule to separate and independent investigations is unwarranted.

The petitioner in *Edwards*, arrested on serious charges, first submitted to interrogation but then requested an attorney. Questions ceased for a while, but when two detectives came to the jail the next morning, a guard advised him that he must talk with them. The petitioner in *Edwards* waived his right to silence and implicated himself in the crime. We reversed the conviction, holding that an accused who expresses his desire to face further questioning with counsel present will not be subject to further interrogation until counsel is made available, unless the accused initiates the exchange himself.

Our ultimate concern in *Edwards*, and in the cases which follow it, is whether the suspect knows and understands his rights and is willing to waive them, and whether courts can be assured that coercion did not induce the waiver. That concern does not dictate the result reached by the Court today, for the dangers present in *Edwards* and later cases are insubstantial here.

The rule in *Edwards* "was in effect a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was." *Oregon* v. *Bradshaw*, *supra*, at 1044 (plurality opinion). Where the subsequent questioning is confined to an entirely independent investigation, there is little risk that the suspect will be badgered into submission.

The Court reasons that it is "by no means clear" that "police engaged in separate investigations will be any less eager than police involved in only one inquiry to question a suspect in custody." *Ante*, at 686. That misses the point. Unless there are so many separate investigations that fresh teams of police are regularly turning up to question the suspect, the danger of badgering is minimal, and insufficient to justify a rigid *per se* rule. Whatever their eagerness, the police in a separate investigation may not commence any questioning unless the suspect is readvised of his *Miranda* rights and consents to the interrogation, and they are required by *Edwards* to cease questioning him if he invokes his right to counsel. Consequently, the legitimate interest of the suspect in not being subjected to coercive badgering is already protected. The reason for the *Edwards* rule is not that confessions are disfavored but that coercion is feared. The rule announced today, however, prohibits the police from resuming questions, after a second *Miranda* warning, when there is no more likelihood of coercion than when the first interrogation began.

The Court suggests that the suspect may believe his rights are fictitious if he must assert them a second time, but the support for this suggestion is weak. The suspect, having observed that his earlier invocation of rights was effective in terminating questioning and having been advised that further questioning may not relate to that crime, would understand that he may invoke his rights again with respect to the new investigation, and so terminate questioning regarding that investigation as well. Indeed, the new warnings and explanations will reinforce his comprehension of a suspect's rights.

I note that the conduct of the police in this case was hardly exemplary; they reinitiated questioning of respondent regarding the first investigation after he had asserted his right to counsel in that investigation. The statements he gave in response, however, properly were excluded at trial for all purposes except impeachment. Any sense of coercion generated by this violation which carried over into the questioning on the second offense would of course be taken into account by a court reviewing whether the waiver of *Miranda* rights in the second investigation was voluntary, and the *per se* rule announced today is therefore not necessary to respond to such misconduct.

Allowing authorities who conduct a separate investigation to read the suspect his *Miranda* rights and ask him whether he wishes to invoke them strikes an appropriate balance, which protects the suspect's freedom from coercion without unnecessarily disrupting legitimate law enforcement efforts. Balance is essential when the Court fashions rules which are preventative and do not themselves stem from violations of a constitutional right. *Michigan* v. *Tucker*, 417 U. S. 433, 444 (1974). By contrast with the Fourth Amendment exclusionary rule, for instance, the rule here operates even absent constitutional violation, see *Oregon* v. *Elstad*, 470 U. S. 298, 306–307 (1985), and we should be cautious in extending it. The Court expresses a preference for bright lines, but the line it draws here is far more restrictive than necessary to protect the interests at stake.

By prohibiting the police from questioning the suspect regarding a separate investigation, the Court chooses to presume that a suspect has made the decision that he does not wish to talk about that investigation without counsel present, although that decision was made when the suspect was unaware of even the existence of a separate investigation. The underlying premise seems to be that there are two types of people: those who never talk without a lawyer and those who always talk without a lawyer. The more realistic view of human nature suggests that a suspect will want the opportunity, when he learns of the separate investigations, to decide whether he wishes to speak to the authorities in a particular investigation with or without representation.

In other contexts, we have taken a more realistic approach to separate and independent investigations. In *Maine* v. *Moulton*, 474 U. S. 159 (1985), we held that the Sixth Amendment right to counsel barred admission of statements elicited from a criminal defendant by a government informant when the statements related to the charge on which the defendant had been indicted. We were careful to note, however, that the rule would have been otherwise had the statements related to a different charge. "[T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities." *Id.*, at 180. Similarly, we held in *Michigan* v. *Mosley*, 423 U. S. 96 (1975), that a suspect who had been arrested on charges of committing robbery and who had invoked his right to silence could be questioned later about an unrelated murder, if first read his *Miranda* rights. The Court correctly points out that neither of these cases necessarily control the one before us; *Moulton* involved the Sixth Amendment right to counsel and *Mosley* involved the Fifth Amendment right to silence, while this case involves the Fifth Amendment right to counsel. *Moulton* and *Mosley* nevertheless reflected an understanding that the invocation of a criminal suspect's constitutional rights could be respected, and the opportunities for unfair coercion restricted, without the establishment of a broad-brush rule by which the assertion of a right in one investigation is automatically applied to a separate and independent one.

In considering whether to extend the *Edwards* rule to this case, the choice is not between holding, as the Court does, that such statements will never be admissible, and holding that such statements will always be admissible. The choice is between the Court's absolute rule establishing an irrebuttable presumption of coercion, and one which relies upon known and tested warnings, applied to each investigation as required by *Edwards* and *Miranda* v. *Arizona*, 384 U. S. 436 (1966), to insure that a waiver is voluntary. The problems to which *Edwards* was addressed are not present here in any substantial degree. Today's rule will neither serve the interest of law enforcement nor give necessary protection to the rights of those suspected of crime. I respectfully dissent.

VOLKSWAGENWERK AKTIENGESELLSCHAFT *v.* SCHLUNK, ADMINISTRATOR OF THE ESTATES OF SCHLUNK ET AL.

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

No. 86–1052. Argued March 21, 1988—Decided June 15, 1988

After his parents were killed in an automobile accident, respondent filed a wrongful death action in an Illinois court, alleging that defects in the automobile designed and sold by Volkswagen of America, Inc. (VWoA), in which the parents were driving, caused or contributed to their deaths. When VWoA's answer denied that it had designed or assembled the vehicle, respondent amended his complaint to add as a defendant petitioner here (VWAG), a German corporation which is the sole owner of VWoA. Respondent attempted to serve the amended complaint on VWAG by serving VWoA as VWAG's agent. Filing a special and limited appearance, VWAG moved to quash the service on the grounds that it could be served only in accordance with the Hague Service Convention, and that respondent had not complied with the Convention's requirements. The court denied the motion, reasoning that VWoA and VWAG are so closely related that VWoA is VWAG's agent for service of process as a matter of law, notwithstanding VWAG's failure or refusal to appoint VWoA formally as an agent. The court concluded that, because service was accomplished in this country, the Convention did not apply. The Appellate Court of Illinois affirmed, ruling that the Illinois long-arm statute authorized substituted service on VWoA, and that such service did not violate the Convention.

Held: The Hague Service Convention does not apply when process is served on a foreign corporation by serving its domestic subsidiary which, under state law, is the foreign corporation's involuntary agent for service. Pp. 698–708.

(a) The service of process in this case is not covered by Article 1 of the Convention, which provides that the Convention "shall apply . . . where there is occasion to transmit a judicial . . . document for service abroad." "Service" means a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action. Since the Convention does not itself prescribe a standard for determining the legal sufficiency of the delivery, the internal law of the forum state controls. Thus, where, as here, the forum state's law does not define the applicable method of serving process as requiring the transmittal of documents abroad, the Convention does not apply. This interpretation is consistent with the negotiating history and the general purposes of the Convention. One purpose of the Convention is to provide means to facilitate service of process abroad. The Convention implements this purpose by requiring each state to establish a central authority to assist in the service of process, and nothing in the present decision interferes with that requirement. Another purpose of the Convention is to assure foreign defendants adequate notice. The present decision does not necessarily advance this purpose, because it makes application of the Convention depend on the forum's internal law; however, it is unlikely that any country will draft its internal laws deliberately so as to circumvent the Convention in cases in which it would be appropriate to transmit judicial documents for service abroad. Furthermore, this decision does not prevent voluntary compliance with the Convention even when the forum's internal law does not so require, and such compliance can be advantageous. Pp. 698–706.

(b) VWAG's contention that service upon it was not complete until VWoA transmitted the complaint to it in Germany, and that this transmission "for service abroad" rendered the Convention applicable to the case under Article 1, is without merit. Where, as here, service on a domestic agent is valid and complete under both state law and the Due Process Clause without an official transmission of documents abroad, the inquiry ends and the Convention has no further implications. Pp. 706–708.

145 Ill. App. 3d 594, 503 N. E. 2d 1045, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 708.

Herbert Rubin argued the cause for petitioner. With him on the briefs were *Stephen M. Shapiro*, *Kenneth S. Geller*, *Michael Hoenig*, and *James K. Toohey*.

Jack Samuel Ring argued the cause for respondent. With him on the brief was *Judith E. Fors*.

Jeffrey P. Minear argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Merrill, Deputy Assistant*

Attorney General Spears, *David Epstein*, and *Abraham D. Sofaer*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case involves an attempt to serve process on a foreign corporation by serving its domestic subsidiary which, under state law, is the foreign corporation's involuntary agent for service of process. We must decide whether such service is compatible with the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965 (Hague Service Convention), [1969] 20 U. S. T. 361, T. I. A. S. No. 6638.

I

The parents of respondent Herwig Schlunk were killed in an automobile accident in 1983. Schlunk filed a wrongful death action on their behalf in the Circuit Court of Cook County, Illinois. Schlunk alleged that Volkswagen of America, Inc. (VWoA), had designed and sold the automobile that his parents were driving, and that defects in the automobile caused or contributed to their deaths. Schlunk also alleged that the driver of the other automobile involved in the collision was negligent; Schlunk has since obtained a default judgment against that person, who is no longer a party to this lawsuit. Schlunk successfully served his complaint on VWoA, and VWoA filed an answer denying that it had designed or assembled the automobile in question. Schlunk then amended the complaint to add as a defendant Volkswagen Aktiengesellschaft (VWAG), which is the petitioner

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**Peter Heidenberger* filed a brief for the Federal Republic of Germany as *amicus curiae* urging reversal.

Leonard M. Ring filed a brief for the Trial Lawyers of America as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the Illinois Trial Lawyers Association by *William J. Harte;* and for the Motor Vehicle Manufacturers Association of the United States, Inc., by *Jay M. Smyser*, *William H. Crabtree*, and *Edward P. Good*.

here. VWAG, a corporation established under the laws of the Federal Republic of Germany, has its place of business in that country. VWoA is a wholly owned subsidiary of VWAG. Schlunk attempted to serve his amended complaint on VWAG by serving VWoA as VWAG's agent.

VWAG filed a special and limited appearance for the purpose of quashing service. VWAG asserted that it could be served only in accordance with the Hague Service Convention, and that Schlunk had not complied with the Convention's requirements. The Circuit Court denied VWAG's motion. It first observed that VWoA is registered to do business in Illinois and has a registered agent for receipt of process in Illinois. The court then reasoned that VWoA and VWAG are so closely related that VWoA is VWAG's agent for service of process as a matter of law, notwithstanding VWAG's failure or refusal to appoint VWoA formally as an agent. The court relied on the facts that VWoA is a wholly owned subsidiary of VWAG, that a majority of the members of the board of directors of VWoA are members of the board of VWAG, and that VWoA is by contract the exclusive importer and distributor of VWAG products sold in the United States. The court concluded that, because service was accomplished within the United States, the Hague Service Convention did not apply.

The Circuit Court certified two questions to the Appellate Court of Illinois. For reasons similar to those given by the Circuit Court, the Appellate Court determined that VWoA is VWAG's agent for service of process under Illinois law, and that the service of process in this case did not violate the Hague Service Convention. 145 Ill. App. 3d 594, 503 N. E. 2d 1045 (1986). After the Supreme Court of Illinois denied VWAG leave to appeal, 112 Ill. 2d 595 (1986), VWAG petitioned this Court for a writ of certiorari to review the Appellate Court's interpretation of the Hague Service Convention. We granted certiorari to address this issue, 484 U. S. 895 (1987), which has given rise to disagreement among the lower courts. Compare *Ex parte Volkswagenwerk A. G.*, 443 So. 2d 880, 881 (Ala. 1983) (holding that the Hague Service Convention does not apply if a foreign national is served properly through its agent in this country); *Zisman* v. *Sieger*, 106 F. R. D. 194, 199–200 (ND Ill. 1985) (same); *Lamb* v. *Volkswagenwerk A. G.*, 104 F. R. D. 95, 97 (SD Fla. 1985) (same); *McHugh* v. *International Components Corp.*, 118 Misc. 2d 489, 491–492, 461 N. Y. S. 2d 166, 167–168 (1983) (same), with *Cippolla* v. *Picard Porsche Audi, Inc.*, 496 A. 2d 130, 131–132 (R. I. 1985) (holding that the Hague Service Convention is the exclusive means of serving a foreign corporation); *Wingert* v. *Volkswagenwerk A. G.*, Civ. Action Nos. 3:86–2994–16 and 3:86–2995–16 (S. C. May 19, 1987), slip op., at 3–4 (same).

II

The Hague Service Convention is a multilateral treaty that was formulated in 1964 by the Tenth Session of the Hague Conference of Private International Law. The Convention revised parts of the Hague Conventions on Civil Procedure of 1905 and 1954. The revision was intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad. 3 1964 Conférence de la Haye de Droit International Privé, Actes et Documents de la Dixième Session (Notification) 75–77, 363 (1965) (3 Actes et Documents); 1 B. Ristau, International Judicial Assistance (Civil and Commercial) § 4–1 (1984 and 1 Supp. 1986) (1 Ristau). Representatives of all 23 countries that were members of the Conference approved the Convention without reservation. Thirty-two countries, including the United States and the Federal Republic of Germany, have ratified or acceded to the Convention. Brief for United States as *Amicus Curiae* 2, n. 2 (filed Sep. 12, 1987).

The primary innovation of the Convention is that it requires each state to establish a central authority to receive requests for service of documents from other countries. 20

U. S. T. 362, T. I. A. S. 6638, Art. 2. Once a central authority receives a request in the proper form, it must serve the documents by a method prescribed by the internal law of the receiving state or by a method designated by the requester and compatible with that law. Art. 5. The central authority must then provide a certificate of service that conforms to a specified model. Art. 6. A state also may consent to methods of service within its boundaries other than a request to its central authority. Arts. 8–11, 19. The remaining provisions of the Convention that are relevant here limit the circumstances in which a default judgment may be entered against a defendant who had to be served abroad and did not appear, and provide some means for relief from such a judgment. Arts. 15, 16.

Article 1 defines the scope of the Convention, which is the subject of controversy in this case. It says: "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." 20 U. S. T., at 362. The equally authentic French version says, "La présente Convention est applicable, en matière civile ou commerciale, dans tous les cas où un acte judiciaire ou extrajudiciaire doit être transmis à l'étranger pour y être signifié ou notifié." *Ibid.* This language is mandatory, as we acknowledged last Term in *Société Nationale Industrielle Aérospatiale* v. *United States District Court,* 482 U. S. 522, 534, n. 15 (1987). By virtue of the Supremacy Clause, U. S. Const., Art. VI, the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies. Schlunk does not purport to have served his complaint on VWAG in accordance with the Convention. Therefore, if service of process in this case falls within Article 1 of the Convention, the trial court should have granted VWAG's motion to quash.

When interpreting a treaty, we "begin 'with the text of the treaty and the context in which the written words are used.'"

Société Nationale, *supra*, at 534 (quoting *Air France* v. *Saks*, 470 U. S. 392, 397 (1985)). Other general rules of construction may be brought to bear on difficult or ambiguous passages. "'Treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Air France* v. *Saks*, *supra*, at 396 (quoting *Choctaw Nation of Indians* v. *United States*, 318 U. S. 423, 431–432 (1943)).

The Convention does not specify the circumstances in which there is "occasion to transmit" a complaint "for service abroad." But at least the term "service of process" has a well-established technical meaning. Service of process refers to a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action. 1 Ristau § 4–5(2), p. 123 (interpreting the Convention); Black's Law Dictionary 1227 (5th ed. 1979); see 4 C. Wright & A. Miller, Federal Practice and Procedure § 1063, p. 225 (2d ed. 1987). The legal sufficiency of a formal delivery of documents must be measured against some standard. The Convention does not prescribe a standard, so we almost necessarily must refer to the internal law of the forum state. If the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies.

The negotiating history supports our view that Article 1 refers to service of process in the technical sense. The committee that prepared the preliminary draft deliberately used a form of the term "notification" (formal notice), instead of the more neutral term "remise" (delivery), when it drafted Article 1. 3 Actes et Documents, at 78–79. Then, in the course of the debates, the negotiators made the language even more exact. The preliminary draft of Article 1 said that the present Convention shall apply in all cases in which there are grounds *to transmit or to give formal notice of* a judicial or extrajudicial document in a civil or commercial matter to a person staying abroad. *Id.*, at 65 ("La présente Convention est applicable dans tous les cas où il y a lieu *de transmettre ou de notifier* un acte judiciaire ou extrajudiciaire en matière civile ou commerciale à une personne se trouvant à l'étranger") (emphasis added). To be more precise, the delegates decided to add a form of the juridical term "signification" (service), which has a narrower meaning than "notification" in some countries, such as France, and the identical meaning in others, such as the United States. *Id.*, at 152–153, 155, 159, 366. The delegates also criticized the language of the preliminary draft because it suggested that the Convention could apply to transmissions abroad that do not culminate in service. *Id.*, at 165–167. The final text of Article 1, *supra*, eliminates this possibility and applies only to documents transmitted for service abroad. The final report *(Rapport Explicatif)* confirms that the Convention does not use more general terms, such as delivery or transmission, to define its scope because it applies only when there is both transmission of a document from the requesting state to the receiving state, and service upon the person for whom it is intended. *Id.*, at 366.

The negotiating history of the Convention also indicates that whether there is service abroad must be determined by reference to the law of the forum state. The preliminary draft said that the Convention would apply "where there are grounds" to transmit a judicial document to a person staying abroad. The committee that prepared the preliminary draft realized that this implied that the forum's internal law would govern whether service implicated the Convention. *Id.*, at 80–81. The reporter expressed regret about this solution because it would decrease the obligatory force of the Convention. *Id.*, at 81. Nevertheless, the delegates did not change the meaning of Article 1 in this respect.

The Yugoslavian delegate offered a proposal to amend Article 1 to make explicit that service abroad is defined according to the law of the state that is requesting service of process. *Id.*, at 167. The delegate from the Netherlands supported him. *Ibid.* The German delegate approved of the proposal in principle, although he thought it would require a corresponding reference to the significance of the law of the state receiving the service of process, and that this full explanation would be too complicated. *Id.*, at 168. The President opined that there was a choice to be made between the phrase used by the preliminary draft, "where grounds exist," and the Yugoslavian proposal to modify it with the phrase, "according to the law of the requesting state." *Ibid.* This prompted the Yugoslavian delegate to declare that the difference was immaterial, because the phrase "where grounds exist" necessarily refers to the law of the forum. *Ibid.* The French delegate added that, in his view, the law of the forum in turn is equivalent to the law of the requesting state. *Id.*, at 169. At that point, the President recommended entrusting the problem to the drafting committee.

The drafting committee then composed the version of Article 1 that ultimately was adopted, which says that the Convention applies "where there is occasion" to transmit a judicial document for service abroad. *Id.*, at 211. After this revision, the reporter again explained that one must leave to the requesting state the task of defining when a document must be served abroad; that this solution was a consequence of the unavailability of an objective test; and that while it decreases the obligatory force of the Convention, it does provide clarity. *Id.*, at 254. The inference we draw from this history is that the Yugoslavian proposal was rejected because it was superfluous, not because it was inaccurate, and that "service abroad" has the same meaning in the final version of the Convention as it had in the preliminary draft.

VWAG protests that it is inconsistent with the purpose of the Convention to interpret it as applying only when the internal law of the forum requires service abroad. One of the two stated objectives of the Convention is "to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time." 20 U. S. T., at 362. The Convention cannot assure adequate notice, VWAG argues, if the forum's internal law determines whether it applies. VWAG warns that countries could circumvent the Convention by defining methods of service of process that do not require transmission of documents abroad. Indeed, VWAG contends that one such method of service already exists and that it troubled the Conference: *notification au parquet.*

Notification au parquet permits service of process on a foreign defendant by the deposit of documents with a designated local official. Although the official generally is supposed to transmit the documents abroad to the defendant, the statute of limitations begins to run from the time that the official receives the documents, and there allegedly is no sanction for failure to transmit them. 3 Actes et Documents, at 167–169; S. Exec. Rep. No. 6, 90th Cong., 1st Sess., 12 (1967) (statement of Philip Amram, member of the United States delegation); 1 Ristau § 4–33, p. 172. At the time of the 10th Conference, France, the Netherlands, Greece, Belgium, and Italy utilized some type of *notification au parquet.* 3 Actes et Documents, at 75.

There is no question but that the Conference wanted to eliminate *notification au parquet. Id.*, at 75–77. It included in the Convention two provisions that address the problem. Article 15 says that a judgment may not be entered unless a foreign defendant received adequate and timely notice of the lawsuit. Article 16 provides means whereby a defendant who did not receive such notice may seek relief from a judgment that has become final. 20 U. S. T., at 364–365. Like Article 1, however, Articles 15 and 16 apply only when documents must be transmitted abroad for the purpose of service. 3 Actes et Documents, at 168–169. VWAG argues that, if this determination is made according to the internal law of the forum state, the Convention will fail to eliminate variants of *notification au parquet* that do not expressly require transmittal of documents to foreign defendants. Yet such methods of service of process are the least likely to provide a defendant with actual notice.

The parties make conflicting representations about whether foreign laws authorizing *notification au parquet* command the transmittal of documents for service abroad within the meaning of the Convention. The final report is itself somewhat equivocal. It says that, although the strict language of Article 1 might raise a question as to whether the Convention regulates *notification au parquet*, the understanding of the drafting Commission, based on the debates, is that the Convention would apply. *Id.*, at 367. Although this statement might affect our decision as to whether the Convention applies to *notification au parquet*, an issue we do not resolve today, there is no comparable evidence in the negotiating history that the Convention was meant to apply to substituted service on a subsidiary like VWoA, which clearly does not require service abroad under the forum's internal law. Hence neither the language of the Convention nor the negotiating history contradicts our interpretation of the Convention, according to which the internal law of the forum is presumed to determine whether there is occasion for service abroad.

Nor are we persuaded that the general purposes of the Convention require a different conclusion. One important objective of the Convention is to provide means to facilitate service of process abroad. Thus the first stated purpose of the Convention is "to create" appropriate means for service abroad, and the second stated purpose is "to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure." 20 U. S. T., at 362. By requiring each state to establish a central authority to assist in the service of process, the Convention implements this enabling function. Nothing in our decision today interferes with this requirement.

VWAG correctly maintains that the Convention also aims to ensure that there will be adequate notice in cases in which there is occasion to serve process abroad. Thus compliance with the Convention is mandatory in all cases to which it applies, see *supra,* 700–701, and Articles 15 and 16 provide an indirect sanction against those who ignore it, see 3 Actes et Documents, at 92, 363. Our interpretation of the Convention does not necessarily advance this particular objective, inasmuch as it makes recourse to the Convention's means of service dependent on the forum's internal law. But we do not think that this country, or any other country, will draft its internal laws deliberately so as to circumvent the Convention in cases in which it would be appropriate to transmit judicial documents for service abroad. For example, there has been no question in this country of excepting foreign nationals from the protection of our Due Process Clause. Under that Clause, foreign nationals are assured of either personal service, which typically will require service abroad and trigger the Convention, or substituted service that provides "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306, 314 (1950).*

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*The concurrence believes that our interpretation does not adequately guarantee timely notice, which it denominates the "primary" purpose of the Convention, albeit without authority. *Post,* at 711. The concurrence instead proposes to impute a substantive standard to the words, "service abroad." *Post,* at 708. Evidently, a method of service would not be deemed to be "service abroad" within the meaning of Article 1 unless it provides notice to the recipient "in due time." *Post,* at 712, 714. This due process notion cannot be squared with the plain meaning of the words, "service abroad." The contours of the concurrence's substantive standard are not defined, and we note that it would create some uncertainty even on the facts of this case. If the substantive standard tracks the Due Process Clause of the Fourteenth Amendment, it is not self-evident that substituted service on a subsidiary is sufficient with respect to the parent. In

Furthermore, nothing that we say today prevents compliance with the Convention even when the internal law of the forum does not so require. The Convention provides simple and certain means by which to serve process on a foreign national. Those who eschew its procedures risk discovering that the forum's internal law required transmittal of documents for service abroad, and that the Convention therefore provided the exclusive means of valid service. In addition, parties that comply with the Convention ultimately may find it easier to enforce their judgments abroad. See Westin, Enforcing Foreign Commercial Judgments and Arbitral Awards in the United States, West Germany, and England, Law & Policy Int'l Bus. 325, 340–341 (1987). For these reasons, we anticipate that parties may resort to the Convention voluntarily, even in cases that fall outside the scope of its mandatory application.

III

In this case, the Illinois long-arm statute authorized Schlunk to serve VWAG by substituted service on VWoA, without sending documents to Germany. See Ill. Rev. Stat., ch. 110, ¶2–209(a)(1) (1985). VWAG has not petitioned for review of the Illinois Appellate Court's holding that service was proper as a matter of Illinois law. VWAG contends, however, that service on VWAG was not complete until VWoA transmitted the complaint to VWAG in Germany. According to VWAG,

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the only cases in which it has considered the question, this Court held that the activities of a subsidiary are not necessarily enough to render a parent subject to a court's jurisdiction, for service of process or otherwise. *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U. S. 333, 336–337 (1925); *Consolidated Textile Corp.* v. *Gregory*, 289 U. S. 85, 88 (1933); see 18A W. Fletcher, Cyclopedia of Law of Private Corporations § 8773 pp. 250–254 (rev. ed. 1988). Although the particular relationship between VWAG and VWoA might have made substituted service valid in this case, a question that we do not decide, the factbound character of the necessary inquiry makes us doubt whether the standard suggested by the concurrence would in fact be "remarkably easy" to apply, see *post*, at 715.

this transmission constituted service abroad under the Hague Service Convention.

VWAG explains that, as a practical matter, VWoA was certain to transmit the complaint to Germany to notify VWAG of the litigation. Indeed, as a legal matter, the Due Process Clause requires every method of service to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, *supra*, at 314. VWAG argues that, because of this notice requirement, every case involving service on a foreign national will present an "occasion to transmit a judicial . . . document for service abroad" within the meaning of Article 1. Tr. of Oral Arg. 8. VWAG emphasizes that in this case, the Appellate Court upheld service only after determining that "the relationship between VWAG and VWoA is so close that it is certain that VWAG 'was fully apprised of the pendency of the action' by delivery of the summons to VWoA." 145 Ill. App. 3d, at 606, 503 N. E. 2d, at 1053 (quoting *Maunder* v. *DeHavilland Aircraft of Canada, Ltd.*, 102 Ill. 2d 342, 353, 466 N. E. 2d 217, 223, cert. denied, 469 U. S. 1036 (1984)).

We reject this argument. Where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications. Whatever internal, private communications take place between the agent and a foreign principal are beyond the concerns of this case. The only transmittal to which the Convention applies is a transmittal abroad that is required as a necessary part of service. And, contrary to VWAG's assertion, the Due Process Clause does not require an official transmittal of documents abroad every time there is service on a foreign national. Applying this analysis, we conclude that this case does not present an occasion to transmit a judicial document for service abroad within the meaning of Article 1. Therefore the Hague Service Convention does not apply, and service was proper. The judgment of the Appellate Court is

Affirmed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in the judgment.

We acknowledged last Term, and the Court reiterates today, *ante*, at 699, that the terms of the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, [1969] 20 U. S. T. 361, T. I. A. S. No. 6638, are "mandatory," not "optional" with respect to any transmission that Article 1 covers. *Société Nationale Industrielle Aérospatiale* v. *United States District Court*, 482 U. S. 522, 534, and n. 15 (1987). Even so, the Court holds, and I agree, that a litigant may, consistent with the Convention, serve process on a foreign corporation by serving its wholly owned domestic subsidiary, because such process is not "service abroad" within the meaning of Article 1. The Court reaches that conclusion, however, by depriving the Convention of any mandatory effect, for in the Court's view the "forum's internal law" defines conclusively whether a particular process is "service abroad," which is covered by the Convention, or domestic service, which is not. *Ante*, at 704. I do not join the Court's opinion because I find it implausible that the Convention's framers intended to leave each contracting nation, and each of the 50 States within our Nation, free to decide for itself under what circumstances, if any, the Convention would control. Rather, in my view, the words "service abroad," read in light of the negotiating history, embody a substantive standard that limits a forum's latitude to deem service complete domestically.

The first of two objectives enumerated in the Convention's preamble is "to create appropriate means to ensure that judicial . . . documents to be served abroad shall be brought to the notice of the addressee in sufficient time . . . ." 20 U. S. T., at 362. See also *ante*, at 702–703. Until the Convention was implemented, the contracting nations followed widely divergent practices for serving judicial documents across international borders, some of which did not ensure any notice, much less timely notice, and therefore often produced unfair default judgments. See generally International Co-Operation in Litigation: Europe (H. Smit ed. 1965); 3 1965 Conférence de la Haye de Droit International Privé, Actes et Documents de la Dixième Session (Notification) 11–12 (1965) (hereinafter 3 Actes et Documents). Particularly controversial was a procedure, common among civil-law countries, called "*notification au parquet,*" which permitted delivery of process to a local official who was then ordinarily supposed to transmit the document abroad through diplomatic or other channels. See S. Exec. Rep. No. 6, 90th Cong., 1st Sess., 11–12, 14–16 (1967) (S. Exec. Rep. No. 6); S. Doc. C, 90th Cong., 1st Sess., 5–6, 21 (1967) (S. Exec. Doc. C). Typically, service was deemed complete upon delivery of the document to the official whether or not the official succeeded in transmitting it to the defendant and whether or not the defendant otherwise received notice of the pending lawsuit.[1]

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[1] The head of the United States delegation to the Convention described *notification au parquet* as follows:

"This is a system which permits the entry of judgments in personam by default against a nonresident defendant without requiring adequate notice. There is also no real right to move to open the default judgment or to appeal, because the time to move to open judgment or to appeal will generally have expired before the defendant finds out about the judgment.

"Under this system of service, the process-server simply delivers a copy of the writ to a public official's office. The time for answer begins to run immediately. Some effort is supposed to be made through the Foreign Office and through diplomatic channels to give the defendant notice, but failure to do this has no effect on the validity of the service. . . .

"There are no . . . limitations and protections [comparable to due process or personal jurisdiction] under the *notification au parquet* system. Here jurisdiction lies merely if the plaintiff is a local national; nothing more is needed." S. Exec. Rep. No. 6, at 11–12 (statement by Philip W. Amram).

See also S. Exec. Doc. C, at 5 (letter of submittal from Secretary of State Rusk); Amram, The Revolutionary Change in Service of Process Abroad in French Civil Procedure, 2 Int'l Law. 650, 650–651 (1968) (Amram).

The United States delegation to the Convention objected to *notification au parquet* as inconsistent with "the requirements of 'due process of law' under the Federal Constitution." 3 Actes et Documents 128 (citations omitted). The head of the delegation has derided its "'[i]njustice, extravagance, [and] absurdity . . . .'" Amram 651 (citation omitted). In its classic formulation, he observed, *notification au parquet* "'totally sacrificed all rights of the defense in favor of the plaintiff.'" *Id.*, at 652, n. 9 (citation omitted). The Convention's official reporter noted similar "'spirited criticisms of the system' . . . which we wish to see eliminated." 3 Actes et Documents 76 (translated).

In response to this and other concerns, the Convention prescribes the exclusive means for service of process emanating from one contracting nation and culminating in another. As the Court observes, the Convention applies only when the document is to be "transmit[ted] . . . for service abroad"; it covers not every transmission of judicial documents abroad, but only those transmissions abroad that constitute formal "service." See *ante*, at 700. It is common ground that the Convention governs when the procedure prescribed by the internal law of the forum nation or state provides that service is not complete until the document is transmitted abroad. That is not to say, however, as does the Court, that the forum nation may designate any type of service "domestic" and thereby avoid application of the Convention.

Admittedly, as the Court points out, *ibid.*, the Convention's language does not prescribe a precise standard to distinguish between "domestic" service and "service abroad." But the Court's solution leaves contracting nations free to ignore its terms entirely, converting its command into exhortation. Under the Court's analysis, for example, a forum nation could prescribe direct mail service to any foreigner and deem service effective upon deposit in the mailbox, or could arbitrarily designate a domestic agent for any foreign defendant and deem service complete upon receipt domestically by the agent even though there is little likelihood that service would ever reach the defendant. In fact, so far as I can tell, the Court's interpretation permits any contracting nation to revive *notification au parquet* so long as the nation's internal law deems service complete domestically, but cf. *ante*, at 704, even though, as the Court concedes, "such methods of service are the least likely to provide a defendant with actual notice," and even though "[t]here is no question but that the Conference wanted to eliminate *notification au parquet*," *ante*, at 703 (citation omitted).

The Court adheres to this interpretation, which (in the Court's words) "does not necessarily advance" the primary purpose that the Convention itself announces, *ante*, at 705, notwithstanding its duty to read the Convention "with a view to effecting the objects and purposes of the States thereby contracting." *Rocca* v. *Thompson*, 223 U. S. 317, 331–332 (1912). See *Factor* v. *Laubenheimer*, 290 U. S. 276, 293–294 (1933); *Wright* v. *Henkel*, 190 U. S. 40, 57 (1903). Even assuming any quantum of evidence from the negotiating history would suffice to support an interpretation so fundamentally at odds with the Convention's primary purpose, the evidence the Court amasses in support of its reading—two interim comments by the reporter on initial drafts of the Convention suggesting that the forum's internal law would dictate whether a particular form of service implicates the Convention—falls far short. See *ante*, at 701–702.

In the first place, the reporter's comments were by no means uncontroversial. One participant, for example, directly challenged the "report['s] allusion . . . to the danger that the court hearing the proceeding could decide that there were no grounds for service," and observed that "[n]ow, the preamble of [the] draft specifies the objective of the convention, which is to ensure the service of writs to persons in foreign countries in order *to guarantee that these persons will have knowledge of them.*" 3 Actes et Documents 165 (United Kingdom delegate) (translation) (emphasis added).

In fact, the delegates considered a version of Article 1 explicitly prescribing that the Convention's scope would be defined "'according to the law of the petitioning state,'" *id.*, at 167 (quoting proposal of Yugoslavian delegate) (translation), but rejected the proposal at least in part "because it would allow [domestic] law to determine the cases in which transmission is not obligatory." *Ibid.* (Italian delegate) (translation).

If the delegates did not resolve their differences upon tabling the proposal, they apparently did by the time the official reporter issued his *Rapport Explicatif.* This final report, which presumably supersedes all interim comments, stresses "the opinion of the Third Commission [that] the Convention was 'obligatory,'" making no reference to internal law. 3 Actes et Documents 366 (translation). By way of example, the *Rapport* acknowledges that a literal reading of the Convention might raise doubts as to the Convention's coverage of *notification au parquet*, yet announces the understanding of the drafting commission that the Convention would prohibit such service.[2] Thus, reading Article 1 "'in the liberal spirit in which it is intended[,]'" to address "'the hardship and injustice, which [the Convention] seeks to relieve,'" *id.*, at 367 (citation omitted), the *Rapport* interprets the Convention to impose a substantive standard proscribing *notification au parquet* whether the forum nation deems the service "domestic" or "abroad." That substantive standard is captured in the *Rapport*'s admonition that

> "'[a]ll of the transmission channels (prescribed by the convention) *must have as a consequence the fact that the act reach the addressee in due time.* That is a require-

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[2] 3 Actes et Documents 367 (emphasis in original; footnote omitted):

"However, when confronted with the strict letter of the provision, one can always ask the question of knowing whether or not, when a State permits the service or notification of a person in a foreign country to be made *[au parquet]*, the convention is applicable.

"THE AUTHENTIC INTERPRETATION OF THE COMMISSION AS IT EMERGES FROM THE DISCUSSIONS, IS IN THE SENSE OF THE APPLICATION OF THE CONVENTION."

> ment of justice, which assumes its full importance when the act to be transmitted is an act instituting proceedings.'" *Ibid.* (translation) (footnote omitted; emphasis added).

The Court belittles the *Rapport*'s significance by presuming that the reporter assumed, as a matter of the internal law of the various nations then permitting *notification au parquet*, that such service always required transmission abroad, and therefore would always have been deemed "service abroad." See *ante*, at 703–704. But the above-cited passage purports to interpret the Convention, not to survey the various forms of *notification au parquet* then prevalent, and does not so much as hint at the possibility that *notification au parquet* might continue if the domestic law of a forum nation were to deem it "domestic." Moreover, the assumption that the Court imputes to the *Rapport* is inaccurate; as noted above, *notification au parquet* was typically deemed complete upon delivery to the local official. See *supra*, at 709, and n. 1. Any requirement of transmission abroad was no more essential to formal service than is the informal arrangement by which a domestic subsidiary might transmit documents served on it as an agent for its foreign parent. See, *e. g.*, 3 Actes et Documents 169. Thus, if the Court entertains the possibility that the Convention bans *notification au parquet* under all circumstances, *ante*, at 704, it can only be because (notwithstanding the Court's stated analysis) the Convention, read in light of its negotiating history, sets some substantive limit on the forum state's latitude to deem such service "domestic."

Significantly, our own negotiating delegation, whose contemporaneous views are "entitled to great weight," *Société Nationale*, 482 U. S., at 536, n. 19, took seriously the *Rapport*'s conclusion that the Convention is more than just precatory. The delegation's report applauded the Convention as "mak[ing] substantial changes in the practices of many of the civil law countries, moving their practices in the direction of the U. S. approach to international judicial assistance and our concepts of due process in the service of process." S. Exec. Doc. C, at 20 (emphasis added). The delegation's chief negotiator emphasized that "the convention sets up the minimum standards of international judicial assistance which each country which ratifies the convention *must* offer to all others who ratify." S. Exec. Rep. No. 6, at 13 (statement by Philip W. Amram) (emphasis in original). Then-Secretary of State Rusk reiterated the same point,[3] as did the State Department's Deputy Legal Advisor,[4] and President Johnson.[5] The repeated references to "due process" were not, of course, intended to suggest that every contracting nation submitted itself to the intricacies of our constitutional jurisprudence. Rather, they were shorthand formulations of the requirement, common to both due process and the Convention, that process directed on a party abroad should be designed so that the documents "reach the addressee in due time," 3 Actes et Documents 367 (translation).

The negotiating history and the uniform interpretation announced by our own negotiators confirm that the Convention limits a forum's ability to deem service "domestic," thereby avoiding the Convention's terms. Admittedly, the Convention does not precisely define the contours. But that imprecision does not absolve us of our responsibility to apply the Convention mandatorily, any more than imprecision permits us to discard the words "due process of law," U. S. Const., Amdt. 14, § 1. And however difficult it might be in some circumstances to discern the Convention's precise limits, it is remarkably easy to conclude that the Convention does not prohibit the type of service at issue here. Service on a wholly owned, closely controlled subsidiary is reasonably calculated to reach the parent "in due time" as the Convention requires. See, *e. g.*, 9 W. Fletcher, Cyclopedia of Law of Private Corporations § 4412, p. 400 (rev. ed. 1985). That is, in fact, what our own Due Process Clause requires, see *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314–315 (1950), and since long before the Convention's implementation our law has permitted such service, see, *e. g.*, *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437, 444–445 (1952); *Latimer* v. *S/A Industrias Reunidas F. Matarazzo*, 175 F. 2d 184, 185 (CA2 1949) (L. Hand, J.). This is significant because our own negotiators made clear to the Senate their understanding that the Convention would require no major changes in federal or state service-of-process rules.[6] Thus, it is unsurprising that nothing in the negotiating history suggests that the contracting nations were dissatisfied with the practice at issue here, of which they were surely aware, much less that they intended to abolish it like they intended to abolish *notification au parquet.* And since notice served on a wholly owned domestic subsidiary is infinitely more likely to reach the foreign parent's attention than was notice served *au parquet* (or by any other procedure that the negotiators singled out for criticism) there is no reason to interpret the Convention to bar it.

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[3] See S. Exec. Doc. C, at 8 ("[T]he convention . . . *requires* . . . major changes, in the direction of modern and efficient procedures, in the present practices of many other" nations) (emphasis added).

[4] See S. Exec. Rep No. 6, at 7 ("It is to our great advantage to obtain *binding commitments* from other governments that they will adhere to [the] principles" embodied in due process) (statement by Richard D. Kearney) (emphasis added).

[5] See S. Exec. Doc. C, at 1 ("[T]he convention makes important changes in the practices of many civil law countries, moving those practices in the direction of our generous system of international judicial assistance and our concept of due process in the service of documents").

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[6] In words reiterated by Secretary of State Rusk, the delegation observed that "[i]n its broadest aspects the convention makes no basic changes in U. S. practices." S. Exec. Doc. C, at 20. See also *id.*, at 8 ("The most significant aspect of the convention is the fact that it requires so little change in the present procedures in the United States") (letter of submittal of Secretary of State Rusk). The delegation's head likewise repeatedly observed that the Convention "leaves our common-law due-process principles unaffected and unchanged." S. Exec. Rep. No. 6, at 11. See also *id.*, at 9 ("By our internal law . . . we already give to foreign litigants all that this convention would require us to provide"); *id.*, at 16 (Convention "requires no changes in our law of judicial assistance").

My difference with the Court does not affect the outcome of this case, and, given that any process emanating from our courts must comply with due process, it may have little practical consequence in future cases that come before us. But cf. S. Exec. Rep. No. 6, at 15 (statement by Philip W. Amram suggesting that Convention may require "a minor change in the practice of some of our States in long-arm and automobile accident cases" where "service on the appropriate official need be accompanied only by a minimum effort to notify the defendant"). Our Constitution does not, however, bind other nations haling our citizens into their courts. Our citizens rely instead primarily on the forum nation's compliance with the Convention, which the Senate believed would "provide increased protection (due process) for American Citizens who are involved in litigation abroad." *Id.*, at 3. And while other nations are not bound by the Court's pronouncement that the Convention lacks obligatory force, after today's decision their courts will surely sympathize little with any United States national pleading that a judgment violates the Convention because (notwithstanding any local characterization) service was "abroad."

It is perhaps heartening to "think that [no] countr[y] will draft its internal laws deliberately so as to circumvent the Convention in cases in which it would be appropriate to transmit judicial documents for service abroad," *ante*, at 705, although from the defendant's perspective "circumvention" (which, according to the Court, entails no more than exercising a prerogative not to be bound) is equally painful whether deliberate or not. The fact remains, however, that had we been content to rely on foreign notions of fair play and substantial justice, we would have found it unnecessary, in the first place, to participate in a Convention "to ensure that judicial . . . documents to be served abroad [would] be brought to the notice of the addressee in sufficient time," 20 U. S. T., at 362.

SUN OIL CO. *v.* WORTMAN ET AL.

CERTIORARI TO THE SUPREME COURT OF KANSAS

No. 87-352. Argued March 22, 1988—Decided June 15, 1988

In the 1960's and 1970's, petitioner extracted gas from properties leased from respondents in Texas, Oklahoma, and Louisiana, in exchange for agreements to pay royalties. Petitioner's prices for interstate gas sales had to be approved by the Federal Power Commission (FPC), which permitted petitioner to collect proposed increased prices from customers prior to FPC approval on the condition that petitioner comply with regulations requiring it to refund to customers any ultimately unapproved increase plus interest at specified rates. Petitioner withheld royalties on the unapproved increases until it obtained FPC approval. Two of the respondents filed a class action in a Kansas court, seeking interest on the suspended payments for the period they were held and used by petitioner. The trial court held that petitioner was liable for interest at the FPC-set rates under Texas, Oklahoma, and Louisiana law, and that the application of Kansas' 5-year statute of limitations rendered respondents' claims for interest on the July 1976 payments timely. The Kansas Supreme Court affirmed, rejecting petitioner's contentions that (1) the Full Faith and Credit Clause of the Constitution and the Due Process Clause of the Fourteenth Amendment required the application of the statutes of limitations of the other States, under which the suit would be barred, and (2) those same constitutional provisions mandated interpretations of the other States' substantive laws concerning interest that were different from the interpretations arrived at in this case.

Held:

1. The Constitution does not bar application of the forum State's statute of limitations to claims governed by the substantive law of a different State. Pp. 722–730.

(a) Kansas did not violate the Full Faith and Credit Clause by applying its own statute of limitations. The holding of *McElmoyle* v. *Cohen*, 13 Pet. 312, that statutes of limitation may be treated as procedural and therefore governed by the forum State's law for choice-of-law purposes, was correct when handed down. Petitioner's argument that this traditional view should be abandoned in favor of the modern understanding that statutes of limitations are substantive—as exemplified by *Guaranty Trust Co.* v. *York*, 326 U. S. 99, which so held for *Erie* doctrine purposes—is without merit. *Guaranty Trust* itself rejected the notion that there is an equivalence between what is substantive under the *Erie* doctrine and what is substantive for choice-of-law purposes. The adoption of petitioner's argument under the Full Faith and Credit Clause, in the face of the traditional and still subsisting general practice to the contrary, would amount to the improper constitutionalizing of choice-of-law rules, without sufficient guiding standards. Pp. 722–729.

(b) Petitioner's due process attack upon Kansas' adoption of its own statute of limitations is without merit. Both the tradition in place when the constitutional provision was adopted and subsequent and subsisting general practice establish that a State has legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations in the interest of regulating the courts' workload and determining when a claim is stale. Petitioner could not have been unfairly surprised by the application of this established rule. Pp. 729–730.

2. The Kansas Supreme Court did not violate the Full Faith and Credit Clause or the Due Process Clause in its constructions of the laws of Texas, Oklahoma, and Louisiana regarding interest, since it contradicted no law of those States that was clearly established and that had been brought to the court's attention. The court pointed to laws of those States authorizing agreements to pay interest at higher than the specified rates, and petitioner did not point to decisions clearly contradicting the court's conclusion that such an agreement was implied by petitioner's undertaking with the FPC. *Phillips Petroleum Co.* v. *Stahl Petroleum Co.*, 569 S. W. 2d 480 (Tex.), Okla. Stat., Tit. 23, § 8 (1981), and *Whitehall Oil Co.* v. *Boagni*, 217 So. 2d 707 (La. App.), distinguished. Pp. 730–734.

241 Kan. 226, 755 P. 2d 488, affirmed.

SCALIA, J., delivered the opinion of the Court, in Part I of which all participating Members joined, in Part II of which REHNQUIST, C. J., and WHITE, STEVENS, and O'CONNOR, JJ., joined, and in Part III of which BRENNAN, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in part and concurring in the judgment, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 734. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., joined, *post*, p. 743. KENNEDY, J., took no part in the consideration or decision of the case.

Gerald Sawatzky argued the cause for petitioner. With him on the briefs were *Jim H. Goering*, *Timothy B. Mustaine*, and *Edwyn R. Sherwood*.

Gordon Penny argued the cause for respondents. With him on the briefs were *W. Luke Chapin* and *Stephen Jones*.*

JUSTICE SCALIA delivered the opinion of the Court.

Petitioner Sun Oil Company seeks reversal of a decision of the Supreme Court of Kansas that it is liable for interest on certain previously suspended gas royalties. *Wortman* v. *Sun Oil Co.*, 241 Kan. 226, 755 P. 2d 488 (1987) *(Wortman III)*. The Kansas Supreme Court rejected petitioner's contentions that (1) the Full Faith and Credit Clause of the Constitution, Art. IV, § 1, and the Due Process Clause of the Fourteenth Amendment prohibited application of Kansas' statute of limitations so as to allow to proceed in Kansas courts a suit barred by the statute of limitations of the State whose substantive law governs the claim, and (2) those same Clauses of the Constitution mandated interpretations of other States' substantive laws concerning interest that were different from those arrived at by the Kansas courts. We granted certiorari. 484 U. S. 912 (1987).

I

In the 1960's and 1970's, petitioner, a Delaware corporation with its principal place of business in Texas, extracted gas from properties that it leased from respondents. The leases provided that respondents would receive a royalty, usually one-eighth of the proceeds, from the sale of gas. Petitioner sold the gas in interstate commerce at prices that had to be approved by the Federal Power Commission (FPC). The FPC permitted petitioner on several occasions to collect proposed increased prices from customers pending final approval, but required petitioner to refund with interest any amount so collected that was not ultimately approved. Specifically, petitioner had on file with the FPC an under-

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**Charles Alan Wright* and *Brent M. Rosenthal* filed a brief for Wiley Goad as *amicus curiae* urging affirmance.

taking to comply with regulations, now codified at 18 CFR § 154.102 (1987), requiring petitioner to refund any ultimately unapproved increase plus interest at certain specified rates. § 154.102(c). Petitioner made no royalty payments to respondents on the increased amounts collected until the FPC approved the increases. The respondents' royalty shares of these increases have been called "suspended royalty payments" in this litigation.

In July 1976, petitioner paid respondents $1,167,000 in suspended royalty payments after the FPC approved increases that had been collected from July 1974 through April 1976. These payments covered 670 properties, 43.7% of which were located in Texas, 24% in Oklahoma, and 22.8% in Louisiana. In April 1978, petitioner paid respondents $2,676,000 in suspended royalty payments after the FPC approved increases that had been collected from December 1976 through April 1978. These payments covered 690 properties, 40.3% located in Texas, 31.6% in Oklahoma, and 23.6% in Louisiana.

In August 1979, respondents Richard Wortman and Hazel Moore filed a class action in a Kansas trial court on behalf of all landowners to whom petitioner had made or should have made suspended royalty payments, seeking interest on those payments for the period that the payments were held and used by petitioner. The trial court ruled that Kansas law governed all claims for interest, even claims relating to leases in another State and brought by residents of that State. The court further ruled that under Kansas law petitioner was liable for prejudgment interest at the rates petitioner had agreed to pay with respect to customer refunds under the FPC regulations. These rates were 7% per annum prior to October 10, 1974; 9% from then until September 30, 1979; and thereafter the average prime rate compounded quarterly. The trial court relied on *Shutts* v. *Phillips Petroleum Co.*, 222 Kan. 527, 567 P. 2d 1292 (1977) *(Shutts I)*, cert. denied, 434 U. S. 1068 (1978). That case, which also involved suspended royalty payments, had held that Kansas law governed the claims of residents of other States concerning properties in those States, and that under Kansas law (1) the royalty owners were entitled to interest on suspended royalty payments because the royalty payments became owing under the royalty contract at the moment the gas company's customers paid the increases and (2) the interest rate to be used was that set forth in the FPC regulations because the gas company's corporate undertaking with the FPC constituted an agreement to pay that rate. See 222 Kan., at 562–565, 567 P. 2d, at 1317–1319.

The principles of *Shutts I* were reaffirmed in *Shutts* v. *Phillips Petroleum Co.*, 235 Kan. 195, 679 P. 2d 1159 (1984) *(Shutts II)*, a factually similar case involving suspended royalty payments different from those in *Shutts I*. The original decision of the trial court in this case was then affirmed on the strength of *Shutts II* in *Wortman* v. *Sun Oil Co.*, 236 Kan. 266, 690 P. 2d 385 (1984) *(Wortman I)*. The losing gas companies in both cases petitioned this Court for certiorari.

We reversed that part of *Shutts II* which held that Kansas could apply its substantive law to claims by residents of other States concerning properties located in those States, and remanded that case to the Kansas Supreme Court for application of the governing law of the other States to those claims. *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797, 816–823 (1985) *(Shutts III)*. We also vacated the decision in *Wortman I* and remanded it for reconsideration in light of our decision in *Shutts III*. *Sun Oil Co.* v. *Wortman*, 474 U. S. 806 (1985) *(Wortman II)*.

On the remand in this case, the trial court held that under the law of the other States that had been held by *Shutts III* to govern the vast majority of claims, petitioner was liable for interest at the rate specified in the FPC regulations. The trial court further held that nothing in *Shutts III* precluded the application of Kansas' 5-year statute of limitations to these claims, and that therefore claims for interest on the suspended royalty payments made in July 1976 were timely.

The Kansas Supreme Court agreed with the first of these holdings in *Shutts* v. *Phillips Petroleum Co.*, 240 Kan. 764, 732 P. 2d 1286 (1987) *(Shutts IV)*, cert. pending, No. 87–348. The decision that the other States' pertinent substantive legal rules were consistent with those of Kansas was reaffirmed in *Wortman III*, the decision we now review. *Wortman III* also held that this Court's decision in *Shutts III* applied only to substantive law, and not to procedural matters such as the appropriate statute of limitations.

II

This Court has long and repeatedly held that the Constitution does not bar application of the forum State's statute of limitations to claims that in their substance are and must be governed by the law of a different State. See, *e. g.*, *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514, 516–518 (1953); *Townsend* v. *Jemison*, 9 How. 407, 413–420 (1850); *McElmoyle* v. *Cohen*, 13 Pet. 312, 327–328 (1839). We granted certiorari to reexamine this issue. We conclude that our prior holdings are sound.

A

The Full Faith and Credit Clause provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493, 501 (1939). Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that a State may apply its own procedural rules to actions litigated in its courts. The issue here, then, can be characterized as whether a statute of limitations may be considered as a procedural matter for purposes of the Full Faith and Credit Clause.

Petitioner initially argues that *McElmoyle* v. *Cohen, supra,* was wrongly decided when handed down. The holding of *McElmoyle,* that a statute of limitations may be treated as procedural and thus may be governed by forum law even when the substance of the claim must be governed by another State's law, rested on two premises, one express and one implicit. The express premise was that this reflected the rule in international law at the time the Constitution was adopted. This is indisputably correct, see *Le Roy* v. *Crowninshield,* 15 F. Cas. 362, 365, 371 (No. 8,269) (Mass. 1820) (Story, J.) (collecting authorities), and is not challenged by petitioner. The implicit premise, which petitioner does challenge, was that this rule from international law could properly have been applied in the interstate context consistently with the Full Faith and Credit Clause.

The first sentence of the Full Faith and Credit Clause was not much discussed at either the Constitutional Convention or the state ratifying conventions. However, the most pertinent comment at the Constitutional Convention, made by James Wilson of Pennsylvania, displays an expectation that would be interpreted against the background of principles developed in international conflicts law. See 2 M. Farrand, The Records of the Federal Convention of 1787, p. 488 (rev. ed. 1966). Moreover, this expectation was practically inevitable, since there was no other developed body of conflicts law to which courts in our new Union could turn for guidance.[1]

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[1] JUSTICE BRENNAN's concurrence, *post,* at 740, misunderstands the famous statement from *Milwaukee County* v. *M. E. White Co.,* 296 U. S. 268, 276–277 (1935), that "[t]he very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties." This statement is true, as the context of the statement in *Milwaukee County* makes clear, not because the Clause itself radically changed the principles of conflicts law but because it made conflicts principles enforceable as a matter of constitutional command rather than leaving enforcement to the vagaries of the forum's view of comity. See *Estin* v.

The reported state cases in the decades immediately following ratification of the Constitution show that courts looked without hesitation to international law for guidance in resolving the issue underlying this case: which State's law governs the statute of limitations. The state of international law on that subject being as we have described, these early decisions uniformly concluded that the forum's statute of limitations governed even when it was longer than the limitations period of the State whose substantive law governed the merits of the claim. See *Nash* v. *Tupper*, 1 Cai. 402, 412–413 (N. Y. 1803) (citing unreported 1795 New York case,

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Estin, 334 U. S. 541, 546 (1948) (the Full Faith and Credit Clause "substituted a command for the earlier principles of comity and *thus* basically altered the status of the States as independent sovereigns") (emphasis added).

The concurrence's assertion, *post*, at 740–741, n. 3, that *Milwaukee County* did not rely upon international conflicts law is entirely beside the point. It is not our point that the content of the Full Faith and Credit Clause is governed by international conflicts law, but only (in order to meet petitioner's contention that *McElmoyle* was wrong when decided) that its original content was properly derived from that source. The conflicts law embodied in the Full Faith and Credit Clause allows room for common-law development, just as did the international conflicts law that it originally embodied. But the concurrence points to no such common-law development. The rule applied in *McElmoyle* continues to be the rule applied by most of the States. Nor, contrary to what the concurrence says, *post*, at 740–741, n. 3, did *Milwaukee County* strike down a practice that was in accord with then-accepted conflicts principles. Although the Restatement of Conflicts of Laws § 443 (1934) had taken the position that a judgment for taxes was not enforceable in another State, our opinion noted that "[t]he precise question now presented appears to have been decided in only a single case, *New York* v. *Coe Manufacturing Co.*, 112 N. J. L. 536, 172 Atl. 198 [(1934)]," which held, as did this Court, that such a judgment was enforceable. 296 U. S., at 278–279. The opinion took some pains, moreover, to distinguish the traditional conflicts rules that one State need not entertain an action for taxes based on another State's statute, *id.*, at 274–277; see also *id.*, at 279, and that generally one State need not enforce a judgment from another State for a penalty, see *id.*, at 279–280. Cf. Restatement of Conflicts of Laws § 443, Comment *d* (1948 Supp.) (money judgments based on tax claims are enforceable "since such claims are not deemed penalties").

Page v. *Cable*, holding the same); *Pearsall* v. *Dwight*, 2 Mass. 84, 89–90 (1806); *Ruggles* v. *Keeler*, 3 Johns. 263, 267–268 (N. Y. 1808) (Kent, C. J.); *Graves* v. *Graves's Executor*, 5 Ky. 207, 208–209 (1810). By 1820, the use of the forum statute of limitations in the interstate context was acknowledged to be "well settled." *Medbury* v. *Hopkins*, 3 Conn. 472, 473 (1820); accord, *Le Roy* v. *Crowninshield*, *supra*, at 371 ("settled"); cf. *McCluny* v. *Silliman*, 3 Pet. 270, 276–277 (1830) ("well settled"); *Hawkins* v. *Barney's Lessee*, 5 Pet. 457, 466 (1831) ("not to be questioned"). Obviously, judges writing in the era when the Constitution was framed and ratified thought the use of the forum statute of limitations to be proper in the interstate context. Their implicit understanding that the Full Faith and Credit Clause did not preclude reliance on the international law rule carries great weight.

Moreover, this view of statutes of limitations as procedural for purposes of choice of law followed quite logically from the manner in which they were treated for domestic-law purposes. At the time the Constitution was adopted the rule was already well established that suit would lie upon a promise to repay a debt barred by the statute of limitations—on the theory, as expressed by many courts, that the debt constitutes consideration for the promise, since the bar of the statute does not extinguish the underlying right but merely causes the remedy to be withheld. See *Little* v. *Blunt*, 26 Mass. 488, 492 (1830) ("[T]he debt remained, the remedy was gone"); see also *Wetzell* v. *Bussard*, 11 Wheat. 309, 311 (1826). This is the same theory, of course, underlying the conflicts rule: the right subsists, and the forum may choose to allow its courts to provide a remedy, even though the jurisdiction where the right arose would not. See *Graves* v. *Graves's Executor*, *supra*, at 208–209 ("The statute of limitations . . . does not destroy the right but withholds the remedy. It would seem to follow, therefore, that the *lex fori*, and not the *lex loci* was to prevail with respect to the time when the action should be commenced").

The historical record shows conclusively, we think, that the society which adopted the Constitution did not regard statutes of limitations as substantive provisions, akin to the rules governing the validity and effect of contracts, but rather as procedural restrictions fashioned by each jurisdiction for its own courts. As Chancellor Kent explained in his landmark work, 2 J. Kent, Commentaries on American Law 462–463 (2d ed. 1832): "The period sufficient to constitute a bar to the litigation of sta[l]e demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government, consulting its own interest and convenience."

Unable to sustain the contention that under the original understanding of the Full Faith and Credit Clause statutes of limitations would have been considered substantive, petitioner argues that we should apply the modern understanding that they are so. It is now agreed, petitioner argues, that the primary function of a statute of limitations is to balance the competing substantive values of repose and vindication of the underlying right; and we should apply that understanding here, as we have applied it in the area of choice of law for purposes of federal diversity jurisdiction, where we have held that statutes of limitations are substantive, see *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945).

To address the last point first: *Guaranty Trust* itself rejects the notion that there is an equivalence between what is substantive under the *Erie* doctrine and what is substantive for purposes of conflict of laws. 326 U. S., at 108. Except at the extremes, the terms "substance" and "procedure" precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn. In the context of our *Erie* jurisprudence, see *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), that purpose is to establish (within the limits of applicable federal law, including the prescribed Rules of Federal Procedure) substantial uniformity of predictable outcome between cases tried in a federal court and cases tried in the courts of the State in which the federal court sits. See *Guaranty Trust, supra,* at 109; *Hanna* v. *Plumer,* 380 U. S. 460, 467, 471–474 (1965). The purpose of the substance-procedure dichotomy in the context of the Full Faith and Credit Clause, by contrast, is not to establish uniformity but to delimit spheres of state legislative competence. How different the two purposes (and hence the appropriate meanings) are is suggested by this: It is never the case under *Erie* that either federal *or* state law—if the two differ—can properly be applied to a particular issue, cf. *Erie, supra,* at 72–73; but since the legislative jurisdictions of the States overlap, it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another, see *Shutts III,* 472 U. S., at 823 ("[I]n many situations a state court may be free to apply one of several choices of law"). Today, for example, we do not hold that Kansas must apply its own statute of limitations to a claim governed in its substance by another State's law, but only that it may.

But to address petitioner's broader point of which the *Erie* argument is only a part—that we should update our notion of what is sufficiently "substantive" to require full faith and credit: We cannot imagine what would be the basis for such an updating. As we have just observed, the words "substantive" and "procedural" themselves (besides not appearing in the Full Faith and Credit Clause) do not have a precise content, even (indeed especially) as their usage has evolved. And if one consults the purpose of their usage in the full-faith-and-credit context, that purpose is quite simply to give both the forum State and other interested States the legislative jurisdiction to which they are entitled. If we abandon the currently applied, traditional notions of such entitlement we would embark upon the enterprise of constitutionalizing choice-of-law rules, with no compass to guide us beyond our own perceptions of what seems desirable.[2] There is no more reason to consider recharacterizing statutes of limitation as substantive under the Full Faith and Credit Clause than there is to consider recharacterizing a host of other matters generally treated as procedural under conflicts law, and hence generally regarded as within the forum State's legislative jurisdiction. See, *e. g.*, Restatement (Second) of Conflict of Laws § 131 (remedies available), § 133 (placement of burden of proof), § 134 (burden of production), § 135 (sufficiency of the evidence), § 139 (privileges) (1971).

In sum, long established and still subsisting choice-of-law practices that come to be thought, by modern scholars, unwise, do not thereby become unconstitutional. If current conditions render it desirable that forum States no longer treat a particular issue as procedural for conflict of laws purposes, those States can themselves adopt a rule to that effect, *e. g., Heavner* v. *Uniroyal, Inc.*, 63 N. J. 130, 135–141, 305 A. 2d 412, 415–418 (1973) (statute of limitations), or it can be proposed that Congress legislate to that effect under the second sentence of the Full Faith and Credit Clause, cf. *Mills* v. *Duryee*, 7 Cranch 481, 485 (1813); *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S., at 502. It is not the function of this Court, however, to make departures from established choice-of-law precedent and practice constitutionally mandatory. We hold, therefore, that Kansas did not violate the Full Faith and Credit Clause when it applied its own statute of limitations.

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[2] Contrary to JUSTICE BRENNAN's concurrence, *post*, at 739–742, there is nothing unusual about our approach. This Court has regularly relied on traditional and subsisting practice in determining the constitutionally permissible authority of courts. See, *e. g.*, *Young* v. *United States ex rel. Vuitton et Fils, S. A.*, 481 U. S. 787, 795, and n. 7 (1987) (Article III); *Tull* v. *United States*, 481 U. S. 412, 417–421 (1987) (Seventh Amendment); *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813, 820–821 (1986) (disqualification of judges); *Press-Enterprise Co.* v. *Superior Court of California, Riverside County*, 464 U. S. 501, 505–508 (1984) (openness of jury selection process); *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 57–60, and nn. 10–11, 64–76, and nn. 15, 25, 86–87, n. 39 (1982) (plurality opinion of BRENNAN, J., joined by MARSHALL, BLACKMUN, and STEVENS, JJ.) (Article III); *id.*, at 90–91 (REHNQUIST, J., joined by O'CONNOR, J., concurring in judgment); *United States* v. *Nixon*, 418 U. S. 683, 696 (1974) ("In the constitutional sense, controversy . . . means the kind of controversy courts traditionally resolve"). The concurrence's citation, *post*, at 740, of the criticism by the plurality opinion in *Allstate Ins. Co.* v. *Hague*, 449 U. S. 302 (1981), of *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143 (1934), is not to the contrary. That criticism merely rejected the view that the Constitution enshrines the rule that the law of the place of contracting governs validity of all provisions of the contract. By the time of *Allstate*, of course, such a rule could not have been characterized as a subsisting tradition, if it ever could have been, in light of escape devices such as the doctrine of public policy, characterization of an issue as procedural, and the rule that the law of the place of performance governs matters of performance.

B

Petitioner also makes a due process attack upon the Kansas court's application of its own statute of limitations.[3]

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[3] Although petitioner takes up this issue after discussion of the full-faith-and-credit claim, and devotes much less argument to it, we may note that, logically, the full-faith-and-credit claim is entirely dependent upon it. It cannot possibly be a violation of the Full Faith and Credit Clause for a State to decline to apply another State's law in a case where that other State *itself* does not consider it applicable. Although in certain circumstances standard conflicts law considers a statute of limitations to bar the right and not just the remedy, see Restatement (Second) of Conflict of Laws § 143 (1971), petitioner concedes, see Tr. of Oral Arg. 4–5, that (apart from the fact that Kansas does not so regard the out-of-state statutes of limitations at issue here) Texas, Oklahoma, and Louisiana view their own statutes as procedural for choice-of-law purposes, see, *e. g., Los Angeles Airways, Inc.* v. *Lummis*, 603 S. W. 2d 246, 248 (Tex. Civ. App. 1980), cert. denied, 455 U. S. 988 (1982); *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 P. 2d 1236, 1242 (Okla.), cert. denied, 409 U. S. 1052 (1972); *Kirby Lumber Co.* v. *Hicks Co.*, 144 La. 473, 475, 80 So. 663 (1919). A full-faith-and-credit problem can therefore arise only if that disposition by those other States is invalid—that is, if they, as well as Kansas, are compelled to consider their statutes of limitations substantive. The nub of the present controversy, in other words, is the scope of constitution-

Here again neither the tradition in place when the constitutional provision was adopted nor subsequent practice supports the contention. At the time the Fourteenth Amendment was adopted, this Court had not only explicitly approved (under the Full Faith and Credit Clause) forum-state application of its own statute of limitations, but the practice had gone essentially unchallenged. And it has gone essentially unchallenged since. "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31 (1922).

A State's interest in regulating the workload of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations. Moreover, petitioner could in no way have been unfairly surprised by the application to it of a rule that is as old as the Republic. There is, in short, nothing in Kansas' action here that is "arbitrary or unfair," *Shutts III*, 472 U. S., at 821–822, and the due process challenge is entirely without substance.

III

In *Shutts III*, we held that Kansas could not apply its own law to claims for interest by nonresidents concerning royalties from property located in other States. The Kansas Supreme Court has complied with that ruling, but petitioner claims that it has unconstitutionally distorted Texas, Oklahoma, and Louisiana law in its determination of that law made in *Shutts IV* and applied to this case in *Wortman III*.

To constitute a violation of the Full Faith and Credit Clause or the Due Process Clause, it is not enough that a

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ally permissible legislative jurisdiction, and it matters little whether that is discussed in the context of the Full Faith and Credit Clause, as the litigants have principally done, or in the context of the Due Process Clause. Since we are largely traversing ground already covered, our discussion of the due process claim can be brief.

state court misconstrue the law of another State. Rather, our cases make plain that the misconstruction must contradict law of the other State that is clearly established and that has been brought to the court's attention. See, *e. g., Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93, 96 (1917); *Western Life Indemnity Co.* v. *Rupp*, 235 U. S. 261, 275 (1914); *Louisville & Nashville R. Co.* v. *Melton*, 218 U. S. 36, 51–52 (1910); *Banholzer* v. *New York Life Ins. Co.*, 178 U. S. 402, 408 (1900); see also *Shutts III*, *supra*, at 834–842 (STEVENS, J., concurring in part and dissenting in part). We cannot conclude that any of the interpretations at issue here runs afoul of this standard.

1. *Texas:* Petitioner contests the Kansas Supreme Court's interpretation of Texas law on the interest rate. Texas' statutory rate of 6% does not apply when a "specified rate of interest is agreed upon by the parties." Tex. Rev. Civ. Stat. Ann., Art. 5069–1.03 (Vernon 1987). Such an agreement need not be express, but can be inferred from conduct. See *Preston Farm & Ranch Supply, Inc.* v. *Bio-Zyme Enterprises*, 625 S. W. 2d 295, 298, 300 (Tex. 1981). The Kansas court held an agreement to pay interest at a higher rate was implied by petitioner's undertaking with the FPC to comply with federal regulations setting forth the applicable rates of interest for refundable moneys held in suspense. See *Shutts IV*, 240 Kan., at 777, 783–784, 790–791, 732 P. 2d, at 1298, 1302, 1306; see also *Shutts I*, 222 Kan., at 562–565, 567 P. 2d, at 1317–1319.

Petitioner brought to the Kansas court's attention no Texas decision clearly indicating that an agreement to pay interest at a specified rate would not be implied in these circumstances.[4] Petitioner's reliance on *Phillips Petroleum*

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[4] The partial dissent's dissatisfaction with our decision to let stand Kansas' interpretation of Texas law, as well as Oklahoma and Louisiana law, see *infra*, at 733–734, appears to rest on two premises: (1) That respondents have some threshold burden of supporting Kansas' interpretation of what the other States' laws would likely be, *post*, at 743–744, 745–746, 746–747, 748,

Co. v. *Stahl Petroleum Co.*, 569 S. W. 2d 480 (Tex. 1978), is misplaced. Although that case was similar to the present one on its facts, the point at issue here was neither raised nor decided. In *Stahl*, the intermediate Texas court had ordered interest paid at the statutory 6% rate. There is noth-

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and (2) that respondents have not met that burden because Kansas' view of contract law is a manifest departure from normal and proper principles of contract law. *Post*, at 746, 748–749. We think neither premise is correct.

First, placing the initial burden on respondents to support the Kansas court's interpretations is flatly inconsistent with the precedent of this Court. Relief cannot be granted in this Court unless decisions plainly contradicting the Kansas court's interpretations were brought to the Kansas court's attention. See, *e. g.*, *Western Life Indemnity Co.* v. *Rupp*, 235 U. S. 261, 275 (1914) ("If such decision existed, it was incumbent upon defendant to prove it as matter of fact"); *Texas & N. O. R. Co.* v. *Miller*, 221 U. S. 408, 416 (1911) ("There was neither allegation nor proof that the court of last resort in Louisiana had considered the question or made any ruling upon it, and so it became the duty of the Texas courts . . . to decide the question according to their independent judgment"); *Louisville & Nashville R. Co.* v. *Melton*, 218 U. S. 36, 52 (1910) ("[S]uch settled construction must be pleaded and proved").

Second, the partial dissent appears to assume that contract law requires a promisor to make a conscious assumption of an obligation in order to be bound. It is standard contract law, however, that a party may be bound by a custom or usage even though he is unaware of it, and indeed even if he positively intended the contrary. See U. C. C. §§ 1–201(3), 1–205(3), and Comment 4, 1 U. L. A. 44, 84, 85 (1976); Restatement (Second) of Contracts § 221, and Comment *a* (1981). The Kansas Supreme Court considered petitioner's undertaking with the FPC (as well as the reference to a similar undertaking in an indemnity agreement proposed by another oil company to its lessors) to be evidence of an industry usage (or "common understanding," U. C. C. § 1–205, Comment 4, 1 U. L. A. 86) that in a case such as the present one interest would be paid at the FPC-prescribed rates. See *Shutts IV*, 240 Kan., at 784, 732 P. 2d, at 1302 (describing undertaking with FPC as showing "industry practice"). Especially since the existence and scope of a particular usage is usually a question of fact, see U. C. C. § 1–205(2), 1 U. L. A. 84; Restatement (Second) of Contracts § 219, Comment *a*; § 222(2), it seems particularly inappropriate to suggest that the Kansas court, without having been referred to any decisions on the subject from the other States, should have known that its decision was contrary to the *law* of those other States.

ing to indicate, however, that the royalty owner had requested anything else, and only the lessee and not the royalty owner appealed. *Id.*, at 481. Thus, the Texas Supreme Court's holding that 6% interest was payable is in no way a holding that more than 6% was not. It is far from unconstitutional for the Kansas Supreme Court to anticipate that the Texas Supreme Court would distinguish the case on the eminently reasonable ground that no rate of interest based on an implied agreement was at issue.

2. *Oklahoma:* Petitioner contests the Kansas Supreme Court's interpretations of Oklahoma law as to both liability for interest and the rate to be paid. Concerning liability, petitioner relies on a statute providing that "[a]ccepting payment of the whole principal, as such, waives all claim to interest." Okla. Stat., Tit. 23, § 8 (1981). But the Oklahoma Supreme Court has held that this statute does not bar a claim for interest based on an implied agreement to pay interest, since in that event the interest becomes, for purposes of the statute, part of the "principal" owed. See *Webster Drilling Co.* v. *Sterling Oil of Oklahoma, Inc.*, 376 P. 2d 236, 238 (1962). Regarding the rate of interest, Oklahoma law provides for 6% only "in the absence of any contract as to the rate of interest, and by contract the parties may agree to any rate as may be authorized by law." Okla. Stat., Tit. 15, § 266 (1981). Thus, for Oklahoma as for Texas, petitioner's contention founders on the fact that it pointed to no decision indicating that an agreement to pay more than 6% interest would not be implied in circumstances such as those of the present case.

3. *Louisiana:* Finally, petitioner contests the Kansas Supreme Court's interpretation of Louisiana law both as to liability for interest and the rate to be paid. Concerning liability, petitioner relies on *Whitehall Oil Co.* v. *Boagni*, 217 So. 2d 707 (La. App. 1968), aff'd on other issues, 255 La. 67, 229 So. 2d 702 (1969). That case involved a situation opposite from that involved here: the gas companies had *paid* the

royalties on increased prices before FPC approval, and were seeking interest on those payments when the approval *did not* ensue. It thus involved a claim for unjust enrichment, see 217 So. 2d, at 709, and does not stand for the proposition that no interest is recoverable on a contractual debt—which would arguably (if not inevitably) have been governed by the Louisiana statute mandating interest on "[a]ll debts . . . from the time they become due." La. Civ. Code Ann., Art. 1938 (West 1977); see also *Wurzlow* v. *Placid Oil Co.*, 279 So. 2d 749, 772–774 (La. App.) (applying Art. 1938 to oil and gas royalties), cert. denied, 282 So. 2d 140 (La. 1973).

As to petitioner's claim that if interest was payable Louisiana's 7% rate clearly applied: The 7% rate specified in the above-quoted statute applied "unless otherwise stipulated." Art. 1938. Petitioner brought to the Kansas court's attention no Louisiana decision indicating that an implied agreement could not constitute such a stipulation, or that an implied agreement would not be found in the circumstances of this case. Cf. *Boutte* v. *Chevron Oil Co.*, 316 F. Supp. 524, 531 (ED La. 1970) (dictum) (gas company will owe royalty owner interest at FPC rates on suspended royalty payments once FPC approves increases), aff'd, 442 F. 2d 1337 (CA5 1971).

* * *

For the reasons stated, the judgment of the Kansas Supreme Court is

Affirmed.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in part and concurring in the judgment.

I join Parts I and III of the Court's opinion. Although I also agree with the result the Court reaches in Part II, I reach that result through a somewhat different path of analysis.

For 150 years, this Court has consistently held that a forum State may apply its own statute of limitations period to out-of-state claims even though it is longer or shorter than the limitations period that would be applied by the State out of which the claim arose. See *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514 (1953) (shorter); *Townsend* v. *Jemison*, 9 How. 407 (1850) (longer); *McElmoyle* v. *Cohen*, 13 Pet. 312 (1839) (shorter). The main question presented in this case is whether this line of authority has been undermined by more recent case law concerning the constitutionality of state choice-of-law rules.[1] See *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797 (1985); *Allstate Ins. Co.* v. *Hague*, 449 U. S. 302 (1981). I conclude that it has not.

I start, as did the Court in *Wells*, by emphasizing that "[t]he Full Faith and Credit Clause does not compel a state to adopt any particular set of rules of conflict of laws; it merely sets certain minimum requirements which each state must observe when asked to apply the law of a sister state." 345 U. S., at 516. The minimum requirements imposed by the Full Faith and Credit Clause[2] are that a forum State should not apply its law unless it has "'a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" *Phillips Petroleum*, *supra*, at 818, quoting *Allstate*, *supra*, at 312–313 (plurality opinion of BRENNAN, J., joined by WHITE, MARSHALL, and BLACKMUN, JJ.). The constitutional issue in this case is somewhat more complicated than usual because the question is not the typical one of whether a State can constitutionally apply its substantive law where both it and another State have certain contacts with the litigants and the facts underlying the dispute. Rather the question here is whether a forum State can constitutionally apply its limitations period, which has mixed substantive and procedural aspects, where its contacts with the dispute stem only from its status as the forum.

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[1] I agree with the Court's rejection of petitioner's additional argument that the constitutionality of applying the forum State's limitations period should be judged under the "outcome-determinative" test of *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945). See *ante*, at 726–727.

[2] The minimum requirements imposed by the Due Process Clause are, in this context, the same as those imposed by the Full Faith and Credit Clause. See *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797, 818–819 (1985); *Allstate Ins. Co.* v. *Hague*, 449 U. S. 302, 308, and n. 10 (1981) (plurality opinion of BRENNAN, J., joined by WHITE, MARSHALL, and BLACKMUN, JJ.); *id.*, at 332 (Powell, J., joined by Burger, C. J., and REHNQUIST, J., dissenting).

Were statutes of limitations purely substantive, the issue would be an easy one, for where, as here, a forum State has no contacts with the underlying dispute, it has no substantive interests and cannot apply its own law on a purely substantive matter. Nor would the issue be difficult if statutes of limitations were purely procedural, for the contacts a State has with a dispute by virtue of being the forum always create state procedural interests that make application of the forum's law on purely procedural questions "neither arbitrary nor fundamentally unfair." *Phillips Petroleum*, *supra*, at 818. Statutes of limitations, however, defy characterization as either purely procedural or purely substantive. The statute of limitations a State enacts represents a balance between, on the one hand, its substantive interest in vindicating substantive claims and, on the other hand, a combination of its procedural interest in freeing its courts from adjudicating stale claims and its substantive interest in giving individuals repose from ancient breaches of law. A State that has enacted a particular limitations period has simply determined that after that period the interest in vindicating claims becomes outweighed by the combination of the interests in repose and avoiding stale claims. One cannot neatly categorize this complicated temporal balance as either procedural or substantive.

Given the complex of interests underlying statutes of limitations, I conclude that the contact a State has with a claim simply by virtue of being the forum creates a sufficient procedural interest to make the application of its limitations period to wholly out-of-state claims consistent with the Full Faith and Credit Clause. This is clearest when the forum State's limitations period is shorter than that of the claim State. A forum State's procedural interest in avoiding the adjudication of stale claims is equally applicable to in-state and out-of-state claims. That the State out of which the claim arose may have concluded that at that shorter period its substantive interests outweigh its procedural interest in avoiding stale claims would not make any difference; it would be "'neither arbitrary nor fundamentally unfair,'" *Phillips Petroleum, supra,* at 818, for the forum State to conclude that *its* procedural interest is more weighty than that of the claim State and requires an earlier time bar, as long as the time bar applied in a nondiscriminatory manner to in-state and out-of-state claims alike.

The constitutional question is somewhat less clear where, as here, the forum State's limitations period is longer than that of the claim State. In this situation, the claim State's statute of limitations reflects its policy judgment that at the time the suit was filed the combination of the claim State's procedural interest in avoiding stale claims and its substantive interest in repose outweighs its substantive interest in vindicating the plaintiff's substantive rights. Assuming, for the moment, that each State has an equal substantive interest in the repose of defendants, then a forum State that has concluded that its procedural interest is less weighty than that of the claim State does not act unfairly or arbitrarily in applying its longer limitations period. The claim State does not, after all, have any substantive interest in *not* vindicating rights it has created. Nor will it do to argue that the forum State has no interest in vindicating the substantive rights of nonresidents: the forum State cannot discriminate against nonresidents, and if it has concluded that the substantive rights of its citizens outweigh its procedural interests at that period then it cannot be faulted for applying that determination evenhandedly.

If the different limitations periods also reflect differing assessments of the substantive interests in the repose of defendants, however, the issue is more complicated. It is, to begin with, not entirely clear whether the interest in the repose of defendants is an interest the State has as a forum or wholly as the creator of the claim at issue. Even if one assumes the latter, determining whether application of the forum State's longer limitations period would thwart the claim State's substantive interest in repose requires a complex assessment of the relative weights of both States' procedural and substantive interests. For example, a claim State may have a substantive interest in vindicating claims that, at a particular period, outweighs its substantive interest in repose standing alone but not the combination of its interests in repose and avoiding the adjudication of stale claims. Such a State would not have its substantive interest in repose thwarted by the claim's adjudication in a State that professed no procedural interest in avoiding stale claims, even if the forum State had less substantive interest in repose than the claim State, because the forum State would be according the claim State's substantive interests all the weight the claim State gives them. Such efforts to break down and weigh the procedural and substantive components and interests served by the various States' limitations periods would, however, involve a difficult, unwieldy and somewhat artificial inquiry that itself implicates the strong procedural interest any forum State has in having administrable choice-of-law rules.

In light of the forum State's procedural interests and the inherent ambiguity of any more refined inquiry in this context, there is some force to the conclusion that the forum State's contacts give it sufficient procedural interests to make it "'neither arbitrary nor fundamentally unfair,'" *Phillips Pe-*

troleum, 472 U. S., at 818, for the State to have a *per se* rule of applying its own limitations period to out-of-state claims—particularly where, as here, the States out of which the claims arise view their statutes of limitations as procedural. See *ante,* at 729–730, n. 3. The issue, after all, is not whether the decision to apply forum limitations law is wise as a matter of choice-of-law doctrine but whether the decision is within the range of constitutionally permissible choices, *Wells,* 345 U. S., at 516, and we have already held that distinctions similar to those offered above "are too unsubstantial to form the basis for constitutional distinctions," *id.,* at 517–518 (holding that it is constitutionally irrelevant whether the foreign limitations period is built into the statutory provision creating the out-of-state cause of action at issue). This conclusion may not be compelled, but the arguments to the contrary are at best arguable, and any merely arguable inconsistency with our current full-faith-and-credit jurisprudence surely does not merit deviating from 150 years of precedent holding that choosing the forum State's limitations period over that of the claim State is constitutionally permissible.

The Court's technique of avoiding close examination of the relevant interests by wrapping itself in the mantle of tradition is as troublesome as it is conclusory. It leads the Court to assert broadly (albeit in dicta) that States do not violate the Full Faith and Credit Clause by adjudicating out-of-state claims under the forum's own law on, *inter alia,* remedies, burdens of proof, and burdens of production. *Ante,* at 728. The constitutionality of refusing to apply the law of the claim State on such issues was not briefed or argued before this Court, and whether, as the Court asserts without support, there are insufficient reasons for "recharacterizing" these issues (at least in part) as substantive is a question that itself presents multiple issues of enormous difficulty and importance which deserve more than the offhand treatment the Court gives them.

Even more troublesome is the Court's sweeping dictum that *any* choice-of-law practice that is "long established and still subsisting" is constitutional. *Ibid.* This statement on its face seems to encompass choice-of-law doctrines on purely substantive issues, and the blind reliance on tradition confuses and conflicts with the full-faith-and-credit test we articulated just three years ago in *Phillips Petroleum, supra,* at 818. See also *Allstate,* 449 U. S., at 308–309, n. 11 (plurality opinion of BRENNAN, J., joined by WHITE, MARSHALL, and BLACKMUN, JJ.) (stating that a 1934 case giving "controlling constitutional significance" to a traditional choice-of-law test "has scant relevance for today"). That certain choice-of-law practices have so far avoided constitutional scrutiny by this Court is in any event a poor reason for concluding their constitutional validity. Nor is it persuasive that the practice reflected the rule applied by States or in international law around the time of the adoption of the Constitution, see *ante,* at 723–726, since "[t]he very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties," *Milwaukee County* v. *M. E. White Co.,* 296 U. S. 268, 276–277 (1935), not to leave matters unchanged.[3] The Court never offers a satisfactory explanation as to why tradition should enable States to engage in practices that, under our current test, are "arbitrary" or "fundamentally unfair." The broad range of choice-of-law practices that may, in one jurisdiction or another, be traditional are not before this Court and have not been surveyed by it, and we can only guess what practices today's opinion

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[3] The Court miscites *Milwaukee County* and *Estin* v. *Estin,* 334 U. S. 541 (1948), for the proposition that the Full Faith and Credit Clause merely made traditional principles of conflicts law enforceable as a matter of constitutional command. See *ante,* at 723–724, n. 1. Although the Court correctly notes that *Estin* states that the Full Faith and Credit Clause "substituted a command for the earlier principles of comity," *Estin, supra,* at 546, nowhere does *Estin* state that the content of that substituted command is determined by reference to principles of traditional conflicts law. To the contrary, *Estin* never refers to traditional conflicts law but rather decides the full-faith-and-credit issue by carefully examining the interests of the various States in having their law applied. 334 U. S., at 546–549. Similarly, *Milwaukee County* does not rely on traditional conflicts law but on the conclusion that the interests behind the local policy were "too trivial to merit serious consideration when weighed against the policy of the constitutional provision and the interest of the [foreign] state whose judgment is challenged." *Milwaukee County* v. *M. E. White Co.,* 296

U. S., at 277. Indeed, *Milwaukee County* expressly noted that its holding that a forum State was constitutionally obligated to enforce a foreign judgment for taxes conflicted with the traditional (and then-subsisting) conflicts of law rule that such foreign judgments were unenforceable. *Id.*, at 279, n. 4 (citing and declining to follow § 443 of the 1934 Restatement of Conflict of Laws). See also Restatement of Conflict of Laws § 443, p. 159 (Supp. 1948) (explaining that this traditional conflicts rule had to be modified because it had been invalidated in *Milwaukee County*). Although *Milwaukee County* also stated that only a single case had decided the question whether a State's tax judgment was entitled to full faith and credit in another State, *Milwaukee County*, *supra*, at 278, the Court did not question the fact that the rule against enforcing foreign tax judgments accorded with then-accepted common-law conflicts doctrine. See also E. Scoles & P. Hay, Conflict of Laws §§ 24.19, 24.23 (1982). In fact, this traditional conflicts rule continues to subsist in the international context where the Full Faith and Credit Clause does not apply. See, *e. g.*, *Her Majesty, Queen in Right of Province of British Columbia* v. *Gilbertson*, 597 F. 2d 1161, 1163–1166, and n. 8 (CA9 1979); *Commissioner of Taxes, Federation of Rhodesia* v. *McFarland*, [1965(1)] S. A. 470, 472 (South Africa Sup. Ct. 1964); *United States* v. *Harden*, [1963] S. C. R. 366 (Canada Sup. Ct.); Uniform Foreign Money-Judgments Recognition Act § 1(2), 13 U. L. A. 263 (1986) (excluding foreign tax judgments from the judgments enforceable under the Act) (adopted in 16 States); Foreign Judgments (Reciprocal Enforcement) Act, 1933, 23 & 24 Geo. 5, ch. 13, pt. I, § 1(2)(b) (same). That *Milwaukee County* did not also invalidate the traditional rules barring adjudication of a foreign tax suit or enforcement of a foreign penalty judgment, see *ante*, at 723–724, n. 1, is irrelevant—*Milwaukee County* reasoned that the constitutional validity of those conflicts rules was not presented, not that their traditional status rendered them sacrosanct. The simple fact remains that the question the Court addressed in *Milwaukee County*, like the question we should address in this case, was not one of conflicts law but of whether as a constitutional matter the forum State had interests justifying application of its own law. "Of that question this Court is the final arbiter," *Milwaukee County*, *supra*, at 274, not tradition or existing practice.

approves sight unseen. Nor am I much comforted by the fact that the Court opines on the constitutionality of traditional choice-of-law practices only to the extent they are "still subsisting," for few cases involve challenges to practices that no longer subsist. One wonders as well how future courts will determine which practices are traditional enough (or subsist strongly enough) to be constitutional, and about the utility of requiring courts to focus on such an uncertain and formalistic inquiry rather than on the fairness and arbitrariness of the choice-of-law rule at issue. Indeed, the disarray of the Court's test is amply demonstrated by the fact that two of the Justices necessary to form the Court leave open the issue of whether a forum State could constitutionally refuse to apply a shorter limitations period regarded as substantive by the foreign State, see *post*, at 743 (O'CONNOR, J., joined by REHNQUIST, C. J., concurring in part and dissenting in part), even though in many States the subsisting tradition of applying the forum's limitations period recognizes no exception for limitations periods considered substantive by the foreign State. See generally Restatement (Second) of Conflict of Laws § 143 and Reporter's Note (1971) (collecting cases).[4]

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[4] The Court misses the point by stating that relying on tradition is not "unusual." *Ante*, at 728, n. 2. That we have in other contexts examined tradition to determine the constitutionally permissible authority of courts is no explanation for abandoning the "interest-contacts" test we have long applied to determine the constitutionally permissible authority of States under the Full Faith and Credit Clause. Nor does it explain why we should adopt a constitutional test that, in the context of conflicts of laws, is confused and purposeless. The Court only heaps more confusion on its "traditional and subsisting practice" test by asserting that by the time of *Allstate Ins. Co.* v. *Hague*, 449 U. S. 302 (1981), the rule that the law of the place of contracting applies "could not have been characterized as a subsisting tradition, if it ever could have been." *Ante*, at 728, n. 2. The doubt expressed about whether this rule was ever a subsisting tradition is remarkable given that it was once *the* dominant rule for determining what law applied in contract cases. See, *e. g.*, Restatement of Conflict of Laws § 332 (1934). True, by the time of *Allstate* the rule no longer commanded a consensus, but the rule still "subsisted" in a majority of States. Scoles &

In short, I fear the Court's rationale will cause considerable mischief with no corresponding benefit. This mischief is all the more unfortunate because it appears to stem from the misperception that this case cannot be resolved without conclusively labeling statutes of limitations as either "procedural" or "substantive." Having asked the wrong question (and an unanswerable one), it is no wonder the Court resorts to tradition rather than analysis to answer it. Because I believe a careful examination of the *Phillips Petroleum* test and the governmental interests created by the relevant contacts provides narrower and sounder grounds for affirming, I concur in the judgment.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

The Court properly concludes that Kansas did not violate the Full Faith and Credit Clause or the Due Process Clause when it chose to apply its own statute of limitations in this case. Different issues might have arisen if Texas, Oklahoma, or Louisiana regarded its own shorter statute of limitations as substantive. Such issues, however, are not presented in this case, and they are appropriately left unresolved. Accordingly, I join Parts I and II of the Court's opinion.

In my view, however, the Supreme Court of Kansas violated the Full Faith and Credit Clause when it concluded that the three States in question would apply the interest rates

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Hay, Conflict of Laws § 18.21, at 666–667. It is difficult to see why this lack of uniformity or the existence of "escape devices" should render this traditional rule any less of a "subsisting tradition" than the rule that the limitations period of the forum governs, which does not apply in many States and which is subject to "escape devices" allowing application of the foreign limitations period when it is "built into" the statute creating the right, when it has attributes the forum State would regard as substantive, when it is considered substantive by the foreign State, and when the forum State has a borrowing statute. See generally Restatement (Second) of Conflict of Laws § 143 and Reporter's Note (1971) (collecting cases).

set forth in the regulations of the Federal Power Commission (FPC). The Court correctly states that misconstruing those States' laws would not by itself have violated the Constitution, for the Full Faith and Credit Clause only required the Kansas court to adhere to law that was clearly established in those States and that had been brought to the Kansas court's attention. See *ante*, at 730–731. Under the standard the Court articulates, however, the Clause was violated. Each of the three States has a statute setting an interest rate that is different from the FPC rate, and the Supreme Court of Kansas offered no valid reason whatsoever for ignoring those statutory rates. Neither has this Court suggested a colorable argument that could support the Kansas court's decision, and its affirmance of that decision effectively converts an important constitutional guarantee into a precatory admonition.

The Kansas courts have applied equitable principles to justify their choice of the FPC interest rate in this and analogous cases. See *ante*, at 720–722; *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797, 816 (1985) *(Shutts III)*. In *Shutts III*, we noted that "Oklahoma would most likely apply its constitutional and statutory 6% interest rate rather than the much higher Kansas rates applied in this litigation"; that "Texas has never awarded any such interest at a rate greater than 6%, which corresponds with the Texas constitutional and statutory rate"; and that "[t]he Kansas interest rate also conflicts with the rate which is applicable in Louisiana." *Id.*, at 817, and n. 7. We supported each of these propositions with appropriate citations to state law, but remanded the case so that the Supreme Court of Kansas could provide "a more thoroughgoing treatment" of the apparent conflicts between its law and the law of the other three States. *Id.*, at 818. We then vacated the judgment in the present case and remanded for reconsideration in light of *Shutts III*. See *Sun Oil Co.* v. *Wortman*, 474 U. S. 806 (1985) *(Wortman II)*.

On remand, the Supreme Court of Kansas considered the *Shutts* case first, and then applied the conclusions reached there in the case before us today. See *Shutts* v. *Phillips Petroleum Co.*, 240 Kan. 764, 732 P. 2d 1286 (1987) *(Shutts IV)*; 241 Kan. 226, 229, 755 P. 2d 488, 490–491 (1987) (opinion below). When one reviews the reasoning of the Kansas court, an undertaking that the majority omits without explanation, that court's failure to give full effect—or any effect—to the laws of its sister States becomes unmistakable.

Adhering to its equitable theory of unjust enrichment, which it now claimed would be adopted by each of the States whose laws it purported to apply, the Kansas court concluded:

> "Under equitable principles, the states would imply an agreement binding [the oil and gas company] to pay the funds held in suspense to the royalty owners when the FPC approved the respective rate increases sought by [the company], together with interest at the rates and in accordance with the FPC regulations found in 18 CFR § 154.102 (1986) to the time of judgment herein. These funds held by [the company] as stakeholder originated in federal law and are thoroughly permeated with interest fixed by federal law in the FPC regulations . . . ." *Shutts IV*, *supra*, at 800, 732 P. 2d, at 1313.

This conclusion was not supported with so much as a single colorable argument. The Kansas court, for example, took note of the following Texas statute:

> " 'When no specified rate of interest is *agreed upon by the parties*, interest at the rate of six percent per annum shall be allowed on all accounts and contracts ascertaining the sum payable, commencing on the thirtieth (30th) day from and after the time when the sum is due and payable.' " 240 Kan., at 777, 732 P. 2d, at 1298 (quoting Tex. Rev. Civ. Stat. Ann., Art. 5069–1.03 (Vernon 1987)) (emphasis added).

This statute was held inapplicable for the following reason. "No Texas court ever mentioned the higher rates set by federal regulations to which [the oil and gas company] had agreed to comply in its corporate undertaking. *This issue has not been determined by the Texas Supreme Court.*" 240 Kan., at 777, 732 P. 2d, at 1298 (emphasis in original; citations omitted). Thus, the only reason suggested for ignoring the contrary language of the Texas statute was that the Texas Supreme Court had not specifically rejected the Kansas equitable theory. The court cited no case in which the Kansas theory had ever been proposed to the Texas courts; no case suggesting that the Texas courts would "imply an agreement" by the parties to adopt the FPC rates in these circumstances; and no case from *any* jurisdiction adopting the Kansas theory under which the funds in question were "thoroughly permeated with interest fixed by federal law." In sum, the Kansas court offered not a single affirmative reason for supposing that the Texas courts would adopt the Kansas theory in the face of the contrary language of the Texas statute.

The Supreme Court of Kansas dealt with the following Oklahoma statute in an equally unsatisfactory manner.

> "'The legal rate of interest shall be six percent (6%) in the absence of any contract as to the rate of interest, and *by contract the parties may agree* to any rate as may be authorized by law, now in effect or hereinafter enacted.'" *Id.*, at 784, 732 P. 2d, at 1302 (quoting Okla. Stat., Tit. 15, §266 (1981)) (emphasis added).

The Kansas court's entire discussion of this statute was as follows:

> "In the above cases where interest was awarded, the applicable rate was six percent. However, in *First Nat. Bank* v. *Cit. & So. Bank*, 651 F. 2d 696 (10th Cir. 1981), applying Oklahoma law, a federal circuit court awarded interest at the rate of ten percent as provided in the promissory note and rejected the argument that interest must be limited to Oklahoma's legal rate of six percent. Therefore, in equity, the corporate undertaking entered

> into by [the oil and gas company] and the FPC would probably be viewed by implication as contractual by the Oklahoma courts and the rates required in 18 CFR § 154.102 (1986) would be imposed, rather than the statutory six percent." 240 Kan., at 784, 732 P. 2d, at 1302.

The court did not explain why it thought that Oklahoma law could properly be inferred from a decision by a federal court. Nor did the court explain why an express agreement in a promissory note should be considered equivalent to the fictional or "implied" agreement that the court chose to find in the case before it. (In *First Nat. Bank of Hominy, Okla.* v. *Citizens and Southern Bank of Cobb Cty., Marietta, Ga.*, 651 F. 2d 696 (CA10 1981), the defendant was the guarantor of the obligation evidenced by the promissory note.) Once again, the Kansas court read its theory of unjust enrichment into another State's law without a shred of affirmative support for doing so.

The applicable Louisiana statute provided that "'[a]ll debts shall bear interest at the rate of seven percent per annum from the time they become due, *unless otherwise stipulated.*'" 240 Kan., at 791, 732 P. 2d, at 1307 (quoting La. Civ. Code Ann., Art. 1938 (West 1977)) (emphasis added). After discussing three irrelevant federal decisions, the Kansas court concluded: "We find Louisiana would apply the FPC rates of interest under equitable principles. *Whitehall Oil Co.* v. *Boagni*, [255] La. 67." 240 Kan., at 793, 732 P. 2d, at 1308. *Boagni*, a 1969 decision of the Supreme Court of Louisiana, does not support the proposition for which it was cited. In that case, an oil and gas company was permitted to recover royalties from its lessors after the FPC revised downwards the gas prices to which the royalties were tied. The Louisiana court reached this conclusion by applying equitable principles "to determine conflicting claims under a contract where there is *neither* express law *nor* contractual provisions governing a determination of them." 255 La. 67, 74, 229 So. 2d 702, 704 (1969) (emphasis added). This holding does not in any way support the proposition that the Louisiana courts would apply equitable principles to reach a result contrary to that dictated by the language of a Louisiana statute. Thus, the Supreme Court of Kansas again concluded that one of its sister States would decline to apply its own statute, and the Kansas court again failed to offer any colorable support for its conclusion.

At bottom, the Kansas court's insistence on its equitable theory seems based on nothing more than its conviction that it *would* have been "fair" for the parties to agree that the oil and gas company should pay the same interest rates for suspended royalty payments arising from approved price increases that the company would have had to pay its customers for refunds arising from disapproved price increases. That is a wholly inadequate basis for concluding that three other States would conclude that the parties *did* make such an agreement. Even assuming that the result imposed on the parties by the Kansas court was "fair," which is not at all obvious, neither that court nor this Court has given any reason for concluding that the parties to the case before us agreed either to adopt the FPC interest rates or to be bound by the Kansas judiciary's notions of equity.

The majority does not discuss the Kansas court's analysis of its sister States' statutes, which clearly indicate that rates of 6% or 7% were applicable. Indeed, the Court appears to think that no analysis was necessary because the Kansas court was not bound by the language of the statutes with which it was confronted. See *ante*, at 732, n. 4 ("Relief cannot be granted in this Court unless *decisions* plainly contradicting the Kansas court's interpretations were brought to the Kansas court's attention" (emphasis added; citations omitted)). This suggestion is inconsistent with the language of the Full Faith and Credit Clause and is not dictated by the holding in any of our previous cases. Nor is the Court on firmer ground when it imagines that the Kansas court merely read "standard contract law" into the statutes of its sister

States. *Ibid.* The "industry practice" of complying with FPC regulations where they are applicable hardly implies an "industry usage" or "common understanding" under which the terms of those regulations are to be applied in other situations where they are *not* applicable. Neither the Kansas court nor this Court has pointed to a single instance—let alone an "industry practice"—in which an oil company and its lessor agreed that the FPC interest rates would apply in circumstances like those presented here. Unless "industry usage" means "practices that the Supreme Court of Kansas thinks are fair," neither standard contract law nor standard logic will support the majority's attempted defense of the Kansas court's result.

Today's decision discards important parts of our decision in *Shutts III*, 472 U. S. 797 (1985), and of the Full Faith and Credit Clause. Faced with the constitutional obligation to apply the substantive law of another State, a court that does not like that law apparently need take only two steps in order to avoid applying it. First, invent a legal theory so novel or strange that the other State has never had an opportunity to reject it; then, on the basis of nothing but unsupported speculation, "predict" that the other State would adopt that theory if it had the chance. To call this giving full faith and credit to the law of another State ignores the language of the Constitution and leaves it without the capacity to fulfill its purpose. Rather than take such a step, I would remand this case to the Supreme Court of Kansas with instructions to give effect to the interest rates established by law in Texas, Oklahoma, and Louisiana. I therefore respectfully dissent.

CITY OF LAKEWOOD *v.* PLAIN DEALER PUBLISHING CO.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 86-1042. Argued November 4, 1987—Decided June 17, 1988

In federal-court proceedings, appellee newspaper publisher challenged, on First Amendment grounds, the facial constitutionality of appellant city's ordinance authorizing the mayor to grant or deny applications for annual permits to publishers to place their newsracks on public property, and, if the application is denied, requiring the mayor to "stat[e] the reasons for such denial." If the application is granted, the ordinance provides that the permit is subject, *inter alia*, to any "terms and conditions deemed necessary and reasonable by the Mayor." The District Court found the ordinance constitutional in its entirety, and entered judgment for the city. The Court of Appeals reversed, finding the ordinance unconstitutional on the ground, among others, that it gave the mayor unbounded discretion to grant or deny a permit application and to place unlimited terms and conditions on any permit that issued.

Held:

1. Appellee may bring a facial challenge to the ordinance without first applying for, and being denied, a permit. Pp. 755–769.

(a) When a licensing statute vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without first submitting to the licensing process. Such a statute constitutes a prior restraint and may result in censorship, engendering risks to free expression that can be effectively alleviated only through a facial challenge. The mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused. Standards limiting the licensor's discretion provide guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without those standards, the difficulties of proof and the case-by-case nature of "as applied" challenges render the licensor's action in large measure effectively unreviewable. Pp. 755–759.

(b) The press or a speaker may not challenge as censorship every law involving discretion to which it is subject; the law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of censorship risks. The allowance of a facial challenge here is justified by the features that (1) the ordinance requires annual permit applications, thus permitting the licensor to measure the probable content or viewpoint of future expression by speech already uttered, and (2) the ordinance is directed narrowly and specifically at expression or conduct commonly associated with expression—the circulation of newspapers—and creates a licensing agency that might tend to favor censorship over speech. The Constitution requires that the city establish neutral criteria to insure that the mayor's licensing decision is not based on the content or viewpoint of the speech being considered. Pp. 759–762.

(c) There is no merit to the theory that the ordinance is not subject to facial challenge because the particular manner of speech (the use of newsracks) may be prohibited entirely, and thus no "First Amendment protected activity" is implicated by the ordinance's imposing less than a total prohibition, even assuming that newsracks may be prohibited entirely. Presumably in the case of a hypothetical ordinance that completely prohibits a particular manner of expression, the law on its face is both content and viewpoint neutral, and the Court would apply the well-settled time, place, and manner test. In contrast, a law permitting communication in a certain manner for some but not for others raises the danger of content and viewpoint censorship, which is at its zenith when the determination of who may speak and who may not is left to an official's unbridled discretion. Even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not *condition* that speech on obtaining a license from an official in that official's boundless discretion. Use of the "greater-includes-the-lesser" reasoning in the latter context is not supported by this Court's First Amendment cases. Pp. 762–769.

2. The portions of appellant city's ordinance giving the mayor discretion to deny a permit application and authority to condition a permit on any terms he deems "necessary and reasonable" are unconstitutional. It cannot be presumed that the mayor will adhere to standards absent from the ordinance's face, and so will deny a permit application only for reasons related to the health, safety, or welfare of city citizens, and that additional terms and conditions will be imposed only for similar reasons. The doctrine forbidding unbridled discretion requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice. The ordinance's minimal requirement that the mayor state his reasons for denying a permit does not provide the standards necessary to ensure constitutional decisionmaking, nor does it, of necessity, provide a solid foundation for eventual judicial review. Even if judicial review

under the ordinance's provision were relatively speedy, such review does not substitute for concrete standards to guide the decisionmaker's discretion. Pp. 769–772.

3. Other questions as to the ordinance's constitutionality presented for review need not be resolved, since the holding regarding the ordinance's mayoral-discretion provisions alone sustains the Court of Appeals' judgment if those provisions of the ordinance are not severable from the remainder. Severability of a local ordinance is a question of state law, and is therefore best resolved below. P. 772.

794 F. 2d 1139, affirmed in part and remanded.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, and SCALIA, JJ., joined. WHITE, J., filed a dissenting opinion, in which STEVENS and O'CONNOR, JJ., joined, *post*, p. 772. REHNQUIST, C. J., and KENNEDY, J., took no part in the consideration or decision of the case.

Henry B. Fischer argued the cause for appellant. With him on the briefs were *Frederick W. Whatley* and *Roger D. Tibbetts*.

James P. Garner argued the cause for appellee. With him on the briefs were *David L. Marburger*, *Bruce W. Sanford*, and *Peter C. Gould*.*

JUSTICE BRENNAN delivered the opinion of the Court.

The city of Lakewood, a suburban community bordering Cleveland, Ohio, appeals a judgment of the Court of Appeals

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*Briefs of *amici curiae* urging reversal were filed for the National Institute of Municipal Law Officers by *William I. Thornton, Jr.*, *Roger F. Cutler*, *Roy D. Bates*, *William H. Taube*, *John W. Witt*, *Robert J. Alfton*, *James K. Baker*, *Joseph N. deRaismes*, *Frank B. Gummy III*, *Robert J. Mangler*, *Neal E. McNeill*, *Analeslie Muncy*, *Dante R. Pellegrini*, *Clifford D. Pierce, Jr.*, and *Charles S. Rhyne;* and for the National League of Cities et al. by *Benna Ruth Solomon*, *Joyce Holmes Benjamin*, *Beate Bloch*, and *Peter Buscemi*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union Foundation by *Gordon J. Beggs*, *John A. Powell*, *Steven R. Shapiro*, *Bruce A. Campbell*, and *Paul L. Hoffman;* and for the American Newspaper Publishers Association et al. by *Robb M. Jones*, *Robert C. Bernius*, *Peter G. Stone*, *Lawrence W. Boes*, *William Niese*, *Boisfeuillet Jones, Jr.*, *W. Terry Maguire*, *Tonda F. Rush*, *Harold W. Fuson, Jr.*, *Alice Neff Lucan*, and *Norton L. Armour*.

for the Sixth Circuit enjoining enforcement of its local ordinance regulating the placement of newsracks. The court's decision was based in part on its conclusion that the ordinance vests the mayor with unbridled discretion over which publishers may place newsracks on public property and where.

I

Prior to 1983, the city of Lakewood absolutely prohibited the private placement of any structure on public property. On the strength of that law, the city denied the Plain Dealer Publishing Company (Newspaper) permission to place its coin-operated newspaper dispensing devices on city sidewalks. In response, the Newspaper brought suit in the District Court for the Northern District of Ohio challenging the ordinance. The District Court adjudged the absolute prohibition unconstitutional, but delayed entering a permanent injunction to give the city time to amend its law.

Although the city could have appealed the District Court's judgment, it decided instead to adopt two ordinances permitting the placement of structures on city property under certain conditions. One of those ordinances specifically concerns newsracks. § 901.181, Codified Ordinances, City of Lakewood (1984).[1] That ordinance gives the mayor the authority to grant or deny applications for annual newsrack permits. If the mayor denies an application, he is required to "stat[e] the reasons for such denial." In the event the mayor grants an application, the city issues an annual permit subject to several terms and conditions. Among them are: (1) approval of the newsrack design by the city's Architectural Board of Review; (2) an agreement by the newsrack owner to indemnify the city against any liability arising from the newsrack, guaranteed by a $100,000 insurance policy to that effect; and (3) any "other terms and conditions deemed necessary and reasonable by the Mayor."[2]

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[1] The other ordinance deals with all other structures and is unchallenged. § 901.18, Codified Ordinances, City of Lakewood (1984).

Dissatisfied with the new ordinance, the Newspaper elected not to seek a permit, and instead amended its complaint in the District Court to challenge facially the law as amended. The District Court found the ordinance constitutional in its entirety, and entered judgment in the city's favor.

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[2] The portions of the ordinance relevant to this appeal are as follows:

"901.181 NEWSPAPER DISPENSING DEVICES; PERMIT AND APPLICATION

"Applications may be made to and on forms approved by the Mayor for rental permits allowing the installation of newspaper dispensing devices on public property along the streets and thoroughfares within the City respecting newspapers having general circulation throughout the City.

"The Mayor shall either deny the application, stating the reasons for such denial or grant said permit subject to the following terms:

"(a) . . . The design of [newsracks] shall be subject to approval by the Architectural Board of Review.

"(b) Newspaper dispensing devices shall not be placed in the residential use districts of the City . . . .

. . . . .

"(c) The rental permit shall be granted upon the following conditions:

. . . . .

"(5) the permittee shall save and hold the City of Lakewood harmless from any and all liability for any reason whatsoever occasioned upon the installation and use of each newspaper dispensing device and shall furnish, at permittee's expense, such public liability insurance as will protect permittee and the City from all claims for damage to property or bodily injury, including death, which may arise from the operation under the permit or in connection therewith and such policy . . . shall be in an amount not less than One Hundred Thousand Dollars ($100,000) . . . .

"(6) rental permits shall be for a term of one year and shall not be assignable; and

"(7) such other terms and conditions deemed necessary and reasonable by the Mayor.

. . . . .

"(e) A person aggrieved by a decision of the Mayor in refusing to grant or revoking a rental permit shall have the right to appeal to Council . . . ."

The ordinance is quoted in full in the opinion below. 794 F. 2d 1139, 1141, n. 1 (CA6 1986).

The Court of Appeals for the Sixth Circuit reversed, finding the ordinance unconstitutional in three respects. First, it held that the ordinance gives the mayor unbounded discretion to grant or deny a permit application and to place unlimited additional terms and conditions on any permit that issues. Second, it concluded that in the absence of any express standards governing newsrack design, the design approval requirement effectively gives the Board unbridled discretion to deny applications. Finally, a majority of the panel decided that the indemnity and insurance requirements for newsrack owners violate the First Amendment because no similar burdens are placed on owners of other structures on public property.[3] The court found that the foregoing provisions of the law were not severable, and therefore held the entire ordinance unconstitutional insofar as it regulates newsracks in commercial districts.[4] The city appealed, and we noted probable jurisdiction. 480 U. S. 904 (1987).

II

At the outset, we confront the issue whether the Newspaper may bring a facial challenge to the city's ordinance. We conclude that it may.

A

Recognizing the explicit protection accorded speech and the press in the text of the First Amendment, our cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license.[5] *E. g., Freedman* v. *Maryland*, 380 U. S. 51, 56 (1965) ("In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, *whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license*") (emphasis added); *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940) (in the First Amendment context, "[o]ne who might have had a license for the asking may . . . call into question the whole scheme of licensing when he is prosecuted for failure to procure it"). See also *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 151 (1969) ("'The Constitution can hardly be thought to deny to one subjected to the restraints of [a licensing law] the right to attack its constitutionality, because he has not yielded to its demands'" (quoting *Jones* v. *Opelika*, 316 U. S. 584, 602 (1942) (Stone, C. J., dissenting), adopted *per curiam* on rehearing, 319 U. S. 103, 104 (1943))); *Lovell* v. *Griffin*, 303 U. S. 444, 452–453 (1938) ("As the ordinance [providing for unbridled licensing discretion] is void on its face, it was not necessary for appellant to seek a permit under it"); cf. *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 956–957 (1984).[6]

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[3] The city asserts that it will apply the indemnity and insurance requirements to all structures on public property except as to the public utilities (telephone booths, utility poles, and bus shelters) already extant on public property when § 901.181 was enacted.

[4] The court decided that the absolute ban on residential newsrack placements was both constitutional and severable. Its decision in that respect is not challenged here.

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[5] Of course, the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away. *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 385 (1973).

[6] In general, compare *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531 (1914) (coal mining), *Yazoo & Mississippi Valley R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217 (1912) (railroad), and *New York ex rel. Lieberman* v. *Van De Carr*, 199 U. S. 552 (1905) (dairy business), all requiring challenges "as applied," with *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S., at 964–968 (charity solicitation), *Hynes* v. *Mayor of Oradell*, 425 U. S. 610 (1976) (registration requirement for political candidate or charity solicitation door to door), *Shuttlesworth* v. *Birmingham*, 394 U. S. 147 (1969) (parade), *Freedman* v. *Maryland*, 380 U. S. 51 (1965) (film censorship), *Talley* v. *California*, 362 U. S. 60 (1960) (handbills), *Saia*

At the root of this long line of precedent is the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. *E. g., Shuttlesworth, supra,* at 151; *Cox* v. *Louisiana,* 379 U. S. 536 (1965); *Staub* v. *City of Baxley,* 355 U. S. 313, 321–322 (1958); *Kunz* v. *New York,* 340 U. S. 290, 294 (1951); *Niemotko* v. *Maryland,* 340 U. S. 268 (1951); *Saia* v. *New York,* 334 U. S. 558 (1948). And these evils engender identifiable risks to free expression that can be effectively alleviated only through a facial challenge. First, the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused. As we said in *Thornhill:*

> "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. . . . The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by the reason of the *threat to censure comments on matters of public concern.* It is not merely the sporadic abuse of power by the censor *but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.*" 310 U. S., at 97 (emphases added).

See also *Freedman, supra.* Self-censorship is immune to an "as applied" challenge, for it derives from the individual's own actions, not an abuse of government power. It is not difficult to visualize a newspaper that relies to a substantial degree on single issue sales feeling significant pressure to endorse the incumbent mayor in an upcoming election, or to re-

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v. *New York,* 334 U. S. 558 (1948) (sound trucks), and *Lovell* v. *Griffin,* 303 U. S. 444 (1938) (leaflets), all allowing facial challenges.

frain from criticizing him, in order to receive a favorable and speedy disposition on its permit application. Only standards limiting the licensor's discretion will eliminate this danger by adding an element of certainty fatal to self-censorship. Cf. *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 498 (1982) (vagueness doctrine). And only a facial challenge can effectively test the statute for these standards.

Second, the absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression. See, *e. g., Joseph H. Munson Co., supra,* at 964, n. 12; *Cox* v. *Louisiana, supra,* at 557. Further, the difficulty and delay inherent in the "as applied" challenge can itself discourage litigation. A newspaper espousing an unpopular viewpoint on a shoestring budget may be the likely target for a retaliatory permit denial, but may not have the time or financial means to challenge the licensor's action. That paper might instead find it easier to capitulate to what it perceives to be the mayor's preferred viewpoint, or simply to close up shop. Even if that struggling paper were willing and able to litigate the case successfully, the eventual relief may be "too little and too late." Until a judicial decree to the contrary, the licensor's prohibition stands. In the interim, opportunities for speech are irretrievably lost. *Freedman, supra,* at 57; see also *Saia, supra,* at 560; *Cantwell* v. *Connecticut,* 310 U. S. 296, 306 (1940). In sum, without standards to fetter the licensor's discretion, the difficulties of proof and the case-by-case nature of "as applied" challenges render the licensor's action in large measure effectively unreviewable.

B

The foregoing concepts form the heart of our test to distinguish laws that are vulnerable to facial challenge from those that are not. As discussed above, we have previously identified two major First Amendment risks associated with unbridled licensing schemes: self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship "as applied" without standards by which to measure the licensor's action. It is when statutes threaten these risks to a significant degree that courts must entertain an immediate facial attack on the law. Therefore, a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers. This is not to say that the press or a speaker may challenge as censorship any law involving discretion to which it is subject. The law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks.

The regulatory scheme in the present case contains two features which, at least in combination, justify the allowance of a facial challenge. First, Lakewood's ordinance requires that the Newspaper apply annually for newsrack licenses. Thus, it is the sort of system in which an individual must apply for multiple licenses over time, or periodically renew a license. When such a system is applied to speech, or to conduct commonly associated with speech, the licensor does not necessarily view the text of the words about to be spoken, but can measure their probable content or viewpoint by speech already uttered. See *Saia* v. *New York, supra.* A speaker in this position is under no illusion regarding the effect of the "licensed" speech on the ability to continue speaking in the future. Yet demonstrating the link between "licensed" expression and the denial of a later license might well prove impossible. While perhaps not as direct a threat to speech as a regulation allowing a licensor to view the actual content of the speech to be licensed or permitted, see *Freedman* v. *Maryland*, 380 U. S. 51 (1965); *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963), a multiple or periodic licensing requirement is sufficiently threatening to invite judicial concern.

A second feature of the licensing system at issue here is that it is directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers. Such a framework creates an agency or establishes an official charged particularly with reviewing speech, or conduct commonly associated with it, breeding an "expertise" tending to favor censorship over speech. *Freedman, supra.* Indeed, a law requiring the licensing of printers has historically been declared the archetypal censorship statute. See 4 W. Blackstone, Commentaries *152. Here again, without standards to bound the licensor, speakers denied a license will have no way of proving that the decision was unconstitutionally motivated, and, faced with that prospect, they will be pressured to conform their speech to the licensor's unreviewable preference.

Because of these features in the regulatory system at issue here, we think that a facial challenge is appropriate, and that standards controlling the mayor's discretion must be required. Of course, the city may require periodic licensing, and may even have special licensing procedures for conduct commonly associated with expression; but the Constitution requires that the city establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered.

In contrast to the type of law at issue in this case, laws of general application that are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of ongoing expression or the words about to be spoken, carry with them little danger of censorship. For example, a law requiring building permits is rarely effective as a means of censorship. To be sure, on rare occasion an opportunity for censorship will exist, such as when an unpopular newspaper seeks to build a new plant. But such laws provide too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse. And if such charges are made, the general application of the statute to areas unrelated to expression will provide the courts a yardstick with which to measure the licensor's occasional speech-related decision.

The foregoing discussion explains why the dissent's analogy between newspapers and soda vendors is inapposite. See *post*, at 788–789. Newspapers are in the business of expression, while soda vendors are in the business of selling soft drinks. Even if the soda vendor engages in speech, that speech is not related to the soda; therefore preventing it from installing its machines may penalize unrelated speech, but will not directly prevent that speech from occurring. In sum, a law giving the mayor unbridled discretion to decide which soda vendors may place their machines on public property does not vest him with frequent opportunities to exercise substantial power over the content or viewpoint of the vendor's speech by suppressing the speech or directly controlling the vendor's ability to speak.

The proper analogy is between newspapers and leaflets. It is settled that leafletters may facially challenge licensing laws. See, *e. g., Talley* v. *California,* 362 U. S. 60 (1960); *Lovell* v. *Griffin,* 303 U. S. 444 (1938). This settled law is based on the accurate premise that peaceful pamphleteering "is not fundamentally different from the function of a newspaper." *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415, 419 (1971); see also *Lovell, supra,* at 450–452. The dissent's theory therefore would turn the law on its head. That result cannot be justified by relying on the meaningless distinction that here the newspapers are ultimately distributed by a machine rather than by hand. First, the ordinance held invalid in *Lovell* applied to distribution "by hand or otherwise." 303 U. S., at 447. The Court did not even consider holding the law invalid only as to distribution by hand. Second, such a distinction makes no sense in logic or theory. The effectiveness of the newsrack as a means of distribution, especially for low-budget, controversial neighborhood newspapers, means that the twin threats of self-censorship and undetectable censorship are, if anything, greater for newsracks than for pamphleteers. Cf. *Schneider* v. *State*, 308 U. S. 147, 164 (1939) (relying on the effectiveness of pamphleteering); *Martin* v. *Struthers*, 319 U. S. 141, 145–146 (1943) (same).

C

In an analysis divorced from a careful examination of the unique risks associated with censorship just discussed and their relation to the law before us, the dissent reasons that if a particular manner of speech may be prohibited entirely, then no "activity protected by the First Amendment" can be implicated by a law imposing less than a total prohibition. It then finds that a total ban on newsracks would be constitutional. Therefore, the dissent concludes, the actual ordinance at issue involves no "activity protected by the First Amendment," and thus is not subject to facial challenge. However, that reasoning is little more than a legal sleight-of-hand, misdirecting the focus of the inquiry from a law allegedly vesting unbridled censorship discretion in a government official toward one imposing a blanket prohibition.[7]

The key to the dissent's analysis is its "greater-includes-the-lesser" syllogism. But that syllogism is blind to the radically different constitutional harms inherent in the "greater" and "lesser" restrictions.[8] Presumably in the case of an ordinance that completely prohibits a particular manner of expression, the law on its face is both content and viewpoint neutral. In analyzing such a hypothetical ordinance, the Court would apply the well-settled time, place, and manner test. *E. g., Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 535 (1980); *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972). The danger giving rise to the First Amendment inquiry is that the government is silencing or restraining a channel of speech; we ask whether some interest unrelated to speech justifies this silence. To put it another way, the question is whether "the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned* v. *City of Rockford*, 408 U. S. 104, 116 (1972).

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[7] Because we reject the dissent's overall logical framework, we do not pass on its view that a city may constitutionally prohibit the placement of newsracks on public property.

In contrast, a law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official. As demonstrated above, we have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker. *E. g., Cox* v. *Louisiana*, 379 U. S., at 557; *Staub*, 355 U. S., at 322. Therefore, even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not *condition* that speech on obtaining a license or permit from a government official in that official's boundless discretion. It bears repeating that "[i]n the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license." *Freedman*, 380 U. S., at 56. Fundamentally, then, the dissent's proposal ignores the different concerns animating our test to determine whether an expressive activity may be banned entirely, and our test to determine whether it may be licensed in an official's unbridled discretion.

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[8] The dissent informs us that it abjures any reliance on a "greater-includes-the-lesser" theory. Yet in the very next sentence we are told that "where an activity . . . could be forbidden altogether (without running afoul of the First Amendment)," then for that reason alone, "the *Lovell-Freedman* doctrine does not apply, and our usual rules concerning the permissibility of discretionary local licensing laws (and facial challenges to those laws) must prevail." *Post*, at 786. In other words, the greater power to prohibit a manner of speech entirely includes the lesser power to license it in an official's unbridled discretion. A clearer example of the discredited doctrine could not be imagined.

This point is aptly illustrated by a comparison of two of our prior cases: *Saia* v. *New York*, 334 U. S. 558 (1948), and *Kovacs* v. *Cooper*, 336 U. S. 77 (1949). In *Saia*, this Court held that an ordinance prohibiting the use of sound trucks without permission from the Chief of Police was unconstitutional because the licensing official was able to exercise unbridled discretion in his decisionmaking, and therefore could, in a calculated manner, censor certain viewpoints. Just seven months later the Court held in *Kovacs* that a city could absolutely ban the use of sound trucks. The plurality distinguished *Saia* precisely on the ground that there the ordinance constituted censorship by allowing some to speak, but not others; in *Kovacs* the statute barred a particular manner of speech for all. 336 U. S., at 80 (plurality opinion of Reed, J.).[9]

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[9] The dissent suggests that the *Kovacs* plurality's distinction of *Saia* is somehow not good law because four other Justices (three of whom were in dissent) adopted the far broader rationale that *Saia* was actually repudi-

Saia is irreconcilable with the logic the dissent now puts forward. Under the dissent's novel rule, the Court in *Saia* should first have determined whether the use of sound trucks could be prohibited completely. If so, as was held in *Kovacs*, the Court should have rejected the constitutional facial chal-

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ated. JUSTICE WHITE's interpretation of *Kovacs* does not square with our settled jurisprudence: when no single rationale commands a majority, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgmen[t] on the narrowest grounds." *Marks* v. *United States*, 430 U. S. 188, 193 (1977). Clearly, in *Kovacs* the plurality opinion put forth the narrowest rationale for the Court's judgment. In any event, history has vindicated the plurality's distinction. *Saia* has been cited literally hundreds of times in its 40-year history (a strange phenomenon had that case been "repudiated"), and never with the notation "overruled on other grounds." See, *e. g., Joseph H. Munson Co.*, 467 U. S., at 965, n. 13 (citing *Saia* for the proposition that where a law on its face presents an unacceptable risk of the suppression of ideas, that law may be struck on its face); *Schad* v. *Mount Ephraim*, 452 U. S. 61, 84 (1981) (STEVENS, J., concurring in judgment) ("Presumably, municipalities may regulate expressive activity—even protected activity—pursuant to narrowly drawn content-neutral standards; however, they may not regulate protected activity when the only standard provided is the unbridled discretion of a municipal official. Compare *Saia* v. *New York*, 334 U. S. 558, with *Kovacs* v. *Cooper*, 336 U. S. 77"); *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976) (*Kovacs* and *Saia* compared in course of a string cite to illustrate that the Court approves time, place, and manner restrictions that are content neutral); *Kunz* v. *New York*, 340 U. S. 290, 294 (1951) (opinion of the Court by Vinson, C. J., joined by Reed, Douglas, Burton, Clark, and Minton, JJ.) (citing *Saia* for the proposition that a regulation placing unbridled discretion in the hands of a government official over the use of a loudspeaker or amplifier is unconstitutional). Nor has *Saia* been cited merely because *Kovacs* has been ignored. See, *e. g., California* v. *LaRue*, 409 U. S. 109, 117, n. 4 (1972) (*Kovacs* cited for the proposition that "States may validly limit the manner in which the First Amendment freedoms are exercised by forbidding sound trucks in residential neighborhoods"); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 386–387 (1969) (citing *Kovacs* for the proposition that sound trucks may be neutrally regulated); *Edwards* v. *South Carolina*, 372 U. S. 229, 242 (1963) (Clark, J., dissenting) (*Kovacs* cited for the proposition that there is no right to broadcast from a sound truck on public streets).

lenge. No "activity protected by the First Amendment" (as the dissent defines it) would have been at issue.[10]

The *Kovacs/Saia* comparison provides perhaps the clearest example of the flaw in the dissent's "greater-includes-the-lesser" reasoning. However, in a host of other First Amendment cases we have expressly or implicitly rejected that logic, and have considered on the merits facial challenges to statutes or policies that embodied discrimination based on the content or viewpoint of expression, or vested officials with open-ended discretion that threatened the same, even where it was assumed that a properly drawn law could have greatly restricted or prohibited the manner of expression or circulation at issue.

For instance, in *Mosley* we considered an ordinance banning all picketing near a school *except* labor picketing. The Court declared the law unconstitutional because the ordinance was sensitive to the content of the message. Whether or not the picket could have been prohibited entirely was not dispositive of the Court's inquiry. 408 U. S., at 96–99. Similarly, in *Flower* v. *United States*, 407 U. S. 197 (1972), the Court summarily reversed a conviction based on Flower's return to a military facility to leaflet after having been ordered to leave once before. It was never doubted that a military commander may generally restrict access to a military facility. But, where the base was for all other purposes treated as part of the surrounding city, the Court refused to allow the commander unbridled discretion to prohibit Flower's leafletting. In *Schacht* v. *United States*, 398 U. S. 58 (1970), the Court struck down a statute permitting actors to wear a military uniform in a theater or motion picture production only "if the portrayal does not tend to discredit that armed force." The Court noted that although a total prohibition would be valid, a prohibition sensitive to the viewpoint of speech could not stand. *Niemotko* provides yet another example of the Court's rejection of "greater-includes-the-lesser" logic in the First Amendment area. There, a Jehovah's Witness was convicted of disorderly conduct after speaking in a park without a license. The Court decided that whatever power a city might have to prohibit *all* religious speech in its parks, it could not allow some but not all religious speech, depending on the exercise of unbridled discretion. 340 U. S., at 272–273. Or, as Justice Frankfurter put it in his concurring opinion, "[a] licensing standard which gives an official authority to censor the content of speech differs *toto cœlo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like." *Id.*, at 282. Cf. *Widmar* v. *Vincent*, 454 U. S. 263 (1981) (public university need not create a public forum, but having done so, it may not restrict access so as to exclude some groups based on the religious content of their speech without constitutional justification); *Madison Joint School District* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167 (1976) (School Board need not create a public forum, but having done so, it cannot restrict who may speak based on the content or viewpoint of the speech). To counter this unanimous line of authority, the dissent does not refer to a single case supporting its view that we cannot consider a facial challenge to an ordinance alleged to constitute censorship over constitutionally protected speech merely because the manner used to circulate that speech might be otherwise regulated or prohibited entirely.

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[10] *Saia* cannot be distinguished from the instant case on the theory that it involved a criminal prosecution. It would be foolish indeed, and contrary to the federal courts' declaratory judgment authorization, 28 U. S. C. § 2201 (1982 ed., Supp. IV), to require the Newspaper to place a newsrack on city property illegally in order to obtain standing to challenge the ordinance. Cf. *Steffel* v. *Thompson*, 415 U. S. 452 (1974).

Ultimately, then, the dissent's reasoning must fall of its own weight. As the preceding discussion demonstrates, this Court has long been sensitive to the special dangers inherent in a law placing unbridled discretion directly to license speech, or conduct commonly associated with speech, in the hands of a government official. In contrast, when the government is willing to prohibit a particular manner of speech entirely—the speech it favors along with the speech it disfavors—the risk of governmental censorship is simply not implicated. The "greater" power of outright prohibition raises other concerns, and we have developed tests to consider them. But we see no reason, and the dissent does not advance one, to ignore censorship dangers merely because other, unrelated concerns are satisfied.

The dissent compounds its error by defining an "activity protected by the First Amendment" by the time, place, or (in this case) manner by which the activity is exercised. The actual "activity" at issue here is the circulation of newspapers, which is constitutionally protected. After all, "[l]iberty of circulating is as essential to [freedom of expression] as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Ex parte Jackson*, 96 U. S. 727, 733 (1878); *Lovell*, 303 U. S., at 452.

The dissent's recharacterization of the issue is not merely semantic; substituting the time, place, or manner for the activity itself allows the dissent to define away a host of activities commonly considered to be protected. The right to demonstrate becomes the right to demonstrate at noise levels proscribed by law; the right to parade becomes the right to parade anywhere in the city 24 hours a day; and the right to circulate newspapers becomes the right to circulate newspapers by way of newsracks placed on public property. Under the dissent's analysis, ordinances giving the Mayor unbridled discretion over whether to permit loud demonstrations or evening parades would not be vulnerable to a facial challenge, since they would not "requir[e] a license to engage in activity protected by the First Amendment." *Post*, at 777. But see *Grayned*, 408 U. S., at 113 (implying that a law banning excessively loud demonstrations was not facially invalid because its terms could not invite "subjective or discriminatory enforcement").

Moreover, we have never countenanced such linguistic prestidigitation, even where a regulation or total prohibition of the "manner" of speech has been upheld. In determining whether expressive conduct is at issue in a censorship case, we do not look solely to the time, place, or manner of expression, but rather to whether the activity in question is commonly associated with expression. For example, in *Kovacs*, it was never doubted that the First Amendment's protection of expression was *implicated* by the ordinance prohibiting sound trucks. The Court simply concluded that the First Amendment was not *abridged.* 336 U. S., at 87. See also *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789 (1984). So here, the First Amendment is certainly implicated by the city's circulation restriction; the question we must resolve is whether the First Amendment is abridged.

III

Having concluded that the Newspaper may facially challenge the Lakewood ordinance, we turn to the merits. Section 901.181, Codified Ordinances, City of Lakewood, provides: "The Mayor shall either deny the application [for a permit], stating the reasons for such denial or grant said permit subject to the following terms . . . ." Section 901.181 (c) sets out some of those terms, including: "(7) such other terms and conditions deemed necessary and reasonable by the Mayor." It is apparent that the face of the ordinance itself contains no explicit limits on the mayor's discretion. Indeed, nothing in the law as written requires the mayor to do more than make the statement "it is not in the public interest" when denying a permit application. Similarly, the mayor could grant the application, but require the newsrack to be placed in an inaccessible location without providing any explanation whatever. To allow these illusory "constraints" to constitute the standards necessary to bound a licensor's discretion renders the guarantee against censorship little more than a high-sounding ideal. See *Shuttlesworth*, 394 U. S., at 150–151.

The city asks us to presume that the mayor will deny a permit application only for reasons related to the health, safety, or welfare of Lakewood citizens, and that additional terms and conditions will be imposed only for similar reasons. This presumes the mayor will act in good faith and adhere to standards absent from the ordinance's face. But this is the very presumption that the doctrine forbidding unbridled discretion disallows. *E. g., Freedman* v. *Maryland*, 380 U. S. 51 (1965). The doctrine requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice. *Poulos* v. *New Hampshire*, 345 U. S. 395 (1953); *Kunz* v. *New York*, 340 U. S. 290 (1951). This Court will not write nonbinding limits into a silent state statute.[11]

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[11] Some have argued, unpersuasively, that pre-enforcement challenges, like this one, unfairly deprive the city of the chance to obtain a constitutional state-court construction or to establish a local practice. It is true that when a state law has been authoritatively construed so as to render it constitutional, or a well-understood and uniformly applied practice has developed that has virtually the force of a judicial construction, the state law is read in light of those limits. That rule applies even if the face of the statute might not otherwise suggest the limits imposed. *Poulos* v. *New Hampshire*, 345 U. S. 395 (1953). Further, this Court will presume any narrowing construction or practice to which the law is "fairly susceptible." *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205 (1975); *Broadrick* v. *Oklahoma*, 413 U. S. 601, 617–618 (1973). But we have never held that a federal litigant must await a state-court construction or the development of an established practice before bringing the federal suit. Cf. *Houston* v. *Hill*, 482 U. S. 451 (1987) (declining to abstain or order certification to allow the state courts to construe a criminal statute where the statute was not fairly susceptible to a narrowing construction).

Once it is agreed that a facial challenge is permissible to attack a law imposing censorship, nothing is gained by requiring one actually denied a license to bring the action. Facial attacks, by their nature, are not dependent on the facts surrounding any particular permit denial. Thus, waiting for an alleged abuse before considering a facial challenge would

Although the dissent disclaims a desire to pass upon the actual ordinance at issue, it apparently cannot resist making a few comments in this regard. *Post*, at 793, n. 13. First, it asserts that the ordinance's requirement that the mayor state his reasons for denying a permit distinguishes this case from other licensing cases. However, the mayor's statement need not be made with any degree of specificity, nor are there any limits as to what reasons he may give. Such a minimal requirement cannot provide the standards necessary to insure constitutional decisionmaking, nor will it, of necessity, provide a solid foundation for eventual judicial review.

The dissent is also comforted by the availability of judicial review. However, that review comes only after the mayor and the City Council have denied the permit. Nowhere in the ordinance is either body required to act with reasonable dispatch. Rather, an application could languish indefinitely before the Council, with the Newspaper's only judicial remedy being a petition for mandamus. Cf. *Freedman*, *supra*, at 54–55, 59. Even if judicial review were relatively speedy, such review cannot substitute for concrete standards to guide the decisionmaker's discretion. *E. g.*, *Saia*, 334 U. S., at 560, and *supra*, at 759–760.

Finally, the dissent attempts to distinguish newsrack permits from parade permits in that the latter are often given for a particular event or time, whereas the former supposedly have no urgency. This overstates the proposition. We agree that in some cases there is exceptional force to the argument that a permit delayed is a permit denied. However, we cannot agree that newspaper publishers can wait indefinitely for a permit only because there will always be news to report. News is not fungible. Some stories may be particularly well covered by certain publications, providing that newspaper with a unique opportunity to develop readership. In order to benefit from that event, a paper needs public

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achieve nothing except to allow the law to exist temporarily in a limbo of uncertainty and to risk censorship of free expression during the interim.

access at a particular time; eventual access would come "too little and too late." *Freedman, supra,* at 57. The Plain Dealer has been willing to forgo this benefit for four years in order to bring and litigate this lawsuit. However, smaller publications may not be willing or able to make the same sacrifice.

IV

We hold those portions of the Lakewood ordinance giving the mayor unfettered discretion to deny a permit application and unbounded authority to condition the permit on any additional terms he deems "necessary and reasonable," to be unconstitutional. We need not resolve the remaining questions presented for review, as our conclusion regarding mayoral discretion will alone sustain the Court of Appeals' judgment if these portions of the ordinance are not severable from the remainder. Severability of a local ordinance is a question of state law, and is therefore best resolved below. See *Mayflower Farms, Inc.* v. *Ten Eyck,* 297 U. S. 266, 274 (1936). Accordingly, we remand this cause to the Court of Appeals to decide whether the provisions of the ordinance we have declared unconstitutional are severable, and to take further action consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE and JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE WHITE, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, dissenting.

Today the majority takes an extraordinary doctrine, developed cautiously by this Court over the past 50 years, and applies it to a circumstance, and in a manner, that is without precedent. Because of this unwarranted expansion of our previous cases, I dissent.

I

At the outset, it is important to set forth the general nature of the dispute.

The Court quite properly does *not* establish any constitutional right of newspaper publishers to place newsracks on municipal property. The Court expressly declines to "pass" on the question of the constitutionality of an outright municipal ban on newsracks. *Ante*, at 762, n. 7. My approach to the specific question before us, which differs from that of the majority, requires me to consider this question; and, as discussed below, our precedents suggest that an outright ban on newsracks on city sidewalks would be constitutional, particularly where (as is true here) ample alternative means of 24-hour distribution of newspapers exist. In any event, the Court's ruling today cannot be read as any indication to the contrary: cities remain free after today's decision to enact such bans.

Moreover, the Court expressly rejects the view, heretofore adopted by some lower courts, that any local scheme that seeks to license the placement of newsracks on public property is *per se* unconstitutional.[1] Cities "may require periodic licensing, and may even have special licensing procedures for conduct commonly associated with expression." *Ante*, at 760. It is only common sense that cities be allowed to exert some control over those who would permanently appropriate city property for the purpose of erecting a newspaper dispensing device.

My disagreement with the Court is not over the constitutional status of newsracks, or the more specific question of the propriety of the licensing of such newspaper vending devices. The dispute in this case is over a more "technical" question: What is the scope of the peculiar doctrine that governs facial challenges to local laws in the First Amendment area? The majority reads our cases as holding that local licensing laws which have "a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of [an] identified censorship ris[k]," will be considered invalid "whenever [such a law] gives a government official . . . substantial power to discriminate based on the content or viewpoint of speech." *Ante*, at 759. This is true, the majority believes, whether or not the speaker can prove that the official's power has been or will be used against him; indeed, it is true even if the government official indicates a willingness to abjure the use of such power (as is the case here).

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[1] See, *e. g.*, *Minnesota Newspaper Assn.* v. *Minneapolis*, 9 Med. L. Rptr. 2116, 2122–2123 (DC Minn. 1983); *Gannett Co.* v. *City of Rochester*, 69 Misc. 2d 619, 330 N. Y. S. 2d 648 (1972).

It is true that certain licensing laws that "giv[e] a government official . . . substantial power to discriminate based on the content or viewpoint of speech" are unconstitutional on their face—without any showing of actual censorship or discrimination, or even without the potential licensee even making an application for a license. But the sweep of this potent doctrine must be limited in a way that is principled; one that is rooted in our precedents and our history. The Court's statement that this doctrine applies *whenever* the license law has "a close . . . nexus to expression, or to conduct commonly associated with expression," is unduly broad. The doctrine, as I see it, applies only when the specific conduct which the locality seeks to license is protected by the First Amendment. Because the placement of newsracks on city property is not so protected (as opposed to the circulation of newspapers as a general matter), the exception to our usual facial challenge doctrine does not apply here.

II

Our prior cases, and an examination of the case before us, indicate that the Lakewood ordinance is not invalid because it vests "excessive discretion" in Lakewood's mayor to grant or deny a newsrack permit.

A

The Court has historically been reluctant to entertain facial attacks on statutes, *i. e.*, claims that a statute is invalid in all of its applications. Our normal approach has been to determine whether a law is unconstitutional as applied in the particular case before the Court.[2] This rule is also the usual approach we follow when reviewing laws that require licenses or permits to engage in business or other activities. In *New York ex rel. Lieberman* v. *Van De Carr,* 199 U. S. 552 (1905), for example, plaintiff in error was convicted of selling milk in New York City without a permit. Plaintiff in error claimed before this Court that the licensing law vested arbitrary power in an administrative board to select those who would be permitted to sell milk. This Court's response was:

> "[Prior] cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the Fourteenth Amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of state authority this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a Federal court." *Id.,* at 562.

There being no showing that the law had been unconstitutionally applied to plaintiff in error, his conviction was affirmed. "One who is required to take out a license will not be heard to complain, in advance of application, that there is a danger of refusal. He should apply and see what happens." *Highland Farms Dairy, Inc.* v. *Agnew,* 300 U. S. 608, 616–617 (1937) (citations omitted). Other cases are to the same effect.[3] Thus, the usual rule is that a law requiring permits for specified activities is not unconstitutional because it vests discretion in administrative officials to grant or deny the permit. The Constitution does not require the Court to assume that such discretion will be illegally exercised. *Douglas* v. *Noble,* 261 U. S. 165, 170 (1923); *Lieberman, supra,* at 562.[4]

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[2] See, *e. g., Brockett* v. *Spokane Arcades, Inc.,* 472 U. S. 491, 501–503 (1985); *United States* v. *Grace,* 461 U. S. 171, 175 (1983); *Nixon* v. *Administrator of General Services,* 433 U. S. 425, 438–439 (1977); *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U. S. 35, 52 (1966); *United States* v. *Raines,* 362 U. S. 17, 20–24 (1960); *Watson* v. *Buck,* 313 U. S. 387, 402 (1941).

There are, however, a few well-established contexts in which the Court has departed from its insistence on an as-applied approach to constitutional adjudication. One of them is where a permit or license is required to engage in expressive activities protected by the First Amendment, and official discretion to grant or deny is not suitably confined. "In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license." *Freedman* v. *Maryland,* 380 U. S. 51, 56 (1965).[5] It is this line of cases on which the majority draws to support its conclusion that the Lakewood ordinance is unconstitutional on its face. *Ante,* at 755–758.

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[3] See, *e. g., Independent Warehouses, Inc.* v. *Scheele,* 331 U. S. 70, 88 (1947); *Smith* v. *Cahoon,* 283 U. S. 553, 562 (1931); *Douglas* v. *Noble,* 261 U. S. 165, 170 (1923); *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 544–545 (1914); *Bradley* v. *Richmond,* 227 U. S. 477, 482–483 (1913); *Western Union Telegraph Co.* v. *Richmond,* 224 U. S. 160, 168 (1912); *Fischer* v. *St. Louis,* 194 U. S. 361, 371 (1904); *Baer* v. *City of Wauwatosa,* 716 F. 2d 1117, 1123–1124 (CA7 1983); *Spanish International Broadcasting Co.* v. *FCC,* 128 U. S. App. D. C. 93, 104, 385 F. 2d 615, 626 (1967); *Wallach* v. *City of Pagedale,* 376 F. 2d 671, 674–675 (CA8 1967).

[4] Confining our attention to the actual impact of a law upon the complaining party is a policy of restraint that rests upon the time-tested advisability of having concrete, rather than hypothetical, cases before us. As a general proposition, we can arrive at informed judgments only when we have a record showing the actual impact of the challenged statute.

Much the same approach underlies the case-or-controversy requirement of Article III. As-applied adjudication also serves the end of deciding no more than necessary to dispose of the specific case under submission and of avoiding unnecessary confrontations with Congress and state or local legislators. Cf. *Ashwander* v. *TVA,* 297 U. S. 288, 346–348 (1936).

The prevailing feature of these exceptional cases, however, is that each of them involved a law that required a license to engage in activity protected by the First Amendment. In each of the cases, the expressive conduct which a city sought to license was an activity which the locality could not prohibit altogether. Streets, sidewalks, and parks are traditional public fora; leafletting, pamphletting, and speaking in such places may be regulated, *Cox* v. *New Hampshire,* 312 U. S. 569, 574–575 (1941); *Cantwell* v. *Connecticut,* 310 U. S. 296, 306–307 (1940); but they may not be entirely forbidden, *Jamison* v. *Texas,* 318 U. S. 413 (1943); *Lovell* v. *Griffin,* 303 U. S. 444 (1938). Likewise, in *Freedman, supra,* at issue was a license requirement that was a prerequisite for any exhibition of a film in the State of Maryland. *Id.,* at 52–53, and n. 1. In all of these cases, the scope of the local license requirement included expressive activity protected by the First Amendment. See also Part II–C, *infra.*

This is how the cases themselves have defined the scope of *Lovell-Freedman* doctrine. Such license requirements are struck down only when they affect the "enjoyment of freedoms which the Constitution guarantees." See *Staub* v. *City of Baxley,* 355 U. S. 313, 322 (1958). It is laws "subjecting the exercise of First Amendment freedoms to" license requirements that we have found suspect, see *Shuttlesworth* v. *Birmingham,* 394 U. S. 147, 150–151 (1969), not merely laws with some amorphous "nexus" to expression.

For example, the *Lovell-Freedman* line of cases would be applicable here if the city of Lakewood sought to license the distribution of all newspapers in the city, or if it required licenses for all stores which sold newspapers. These are obviously newspaper circulation activities which a municipality cannot prohibit and, therefore, any licensing scheme of this scope would have to pass muster under the *Lovell-Freedman* doctrine. But—and this is critical—Lakewood has not cast so wide a net. Instead, it has sought to license only the placement of newsracks (and other like devices) on city property. As I read our precedents, the *Lovell-Freedman* line of cases is applicable here only if the Plain Dealer has a constitutional right to distribute its papers by means of dispensing devices or newsboxes, affixed to the public sidewalks. I am not convinced that this is the case.

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[5] See also, *e. g., Secretary of State of Maryland* v. *Joseph H. Munson Co.,* 467 U. S. 947, 964, n. 12 (1984); *Shuttlesworth* v. *Birmingham,* 394 U. S. 147, 151 (1969); *Cox* v. *Louisiana,* 379 U. S. 536, 557–558 (1965); *Staub* v. *City of Baxley,* 355 U. S. 313, 319 (1958).

B

Appellee has a right to distribute its newspapers on the city's streets, as others have a right to leaflet, solicit, speak, or proselytize in this same public forum area. But this "does not mean that [appellee] can . . . distribute [its newspapers] where, when and how [it] chooses." See *Breard* v. *Alexandria*, 341 U. S. 622, 642 (1951). More specifically, the Plain Dealer's right to distribute its papers does not encompass the right to take city property—a part of the *public* forum, as appellee so vigorously argues—and appropriate it for its own exclusive use, on a semipermanent basis, by means of the erection of a newsbox.[6] "The publisher of a newspaper . . .

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[6] Appellee resists this "characterization" of its placement of newsboxes on city property, arguing that it is not seeking to "ren[t]" or have "permanently set aside" portions of the sidewalk for its newsracks. See Tr. of Oral Arg. 37, 47. Rather, appellee contends, it is merely seeking to exercise its "First Amendment right" to distribute newspapers by means of a newsrack, "the mechanical cousin" of the traditional means of selling papers on city streets, the "newsboy." See Brief for Appellee 10; cf. *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 115–116 (1944).

This "characterization" of its activities is unpersuasive. While newsboxes may not be "permanent" structures in the way that buildings are, they are not a peripatetic presence either. See Tr. of Oral Arg. 37–38; cf. *McDonald* v. *Gannett Publications*, 121 Misc. 2d 90, 90–91, 467 N. Y. S. 2d 300, 301 (1983); Editor & Publisher, Apr. 9, 1983, p. 8., col. 1 (discuss-has no special privilege to invade the rights and liberties of others," *Associated Press* v. *NLRB*, 301 U. S. 103, 132–133 (1937); these protected "rights of others" have always included the public-at-large's right to use the public forum for its chosen activities, including free passage of the streets. See *Schneider* v. *State*, 308 U. S. 147, 160 (1939).

From the outset of its contemporary public forum cases, this Court has recognized that city streets and sidewalks "have immemorially been held in trust for use of the public." *Hague* v. *CIO*, 307 U. S. 496, 515 (1939). This means *all* of the public, and does not create a First Amendment right in newspaper publishers to "cordon" off a portion of the sidewalk in an effort to increase the circulation of their papers. Cf. *Schneider*, *supra*, at 160. As this Court wrote long ago, in upholding an ordinance that restricted a telegraph company's placement of telegraph poles on city property:

> "The ordinary traveler, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting. . . . This use is common to all members of the public, and it is a use open equally to [all] citizens . . . . But the use made by

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ing "bolting" of newsracks to city sidewalks). Here, the District Court found that the "placement of a newspaper dispensing device on property is normally of a permanent nature, the device generally occupying a specific portion of property for months or years." App. to Juris. Statement A30–A31.

There is little doubt that if a State were to place an object of the size, weight, and permanence of a newsrack on private property, this "physical occupation" would constitute a "taking" of that property. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 427–430, 434–435 (1982); *Lovett* v. *West Virginia Central Gas Co.*, 65 W. Va. 739, 742–743, 65 S. E. 196, 197–198 (1909); *Southwestern Bell Telephone Co.* v. *Webb*, 393 S. W. 2d 117, 121 (Mo. App. 1965). The character of the newsrack's intrusion on city sidewalks is not lessened by the fact that the property here is public, the occupation is by a private party, or that the purpose of the "taking" is the communication of ideas. See generally *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 98–99 (1893) (discussed in text *infra* this page and 780).

> the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. . . . Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of a highway and personal travel, wholly lost to the public." *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 98–99 (1893).

While there is a First Amendment right to publish newspapers, publishers have no right to force municipalities to turn over public property for the construction of a printing facility. There is a First Amendment right to sell books, but we would not accept an argument that a city must allow a bookseller to construct a bookshop—even a small one—on a city sidewalk. The right to leaflet does not create a right to build a booth on city streets from which leafletting can be conducted. Preventing the "taking" of public property for these purposes does not abridge First Amendment freedoms. Just as there is no First Amendment right to operate a bookstore or locate a movie theater however or wherever one chooses notwithstanding local laws to the contrary, see *Arcara* v. *Cloud Books, Inc.*, 478 U. S. 697 (1986); *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986), the First Amendment does not create a right of newspaper publishers to take city streets to erect structures to sell their papers.

It may be that newspaper distributors can sell more papers by placing their newsracks on city sidewalks. But those seeking to distribute materials protected by the First Amendment do not have a right to appropriate public property merely because it best facilitates their efforts. "We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" *Regan* v. *Taxation with Representation of Wash.*, 461 U. S. 540, 546 (1983) (quoting *Cammarano* v. *United States*, 358 U. S. 498, 515 (1959) (Douglas, J., concurring)). Consequently, a city need not subsidize news distribution activities by giving, selling, or leasing a portion of city property for the erection of newsracks. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida*, 385 U. S. 39, 47 (1966). Preserving public forum space for use by the public *generally*, as opposed to the exclusive use of one individual or corporation, is obviously one such "lawfully dedicated" use. "The streets belong to the public and are primarily for the use of the public in the ordinary way." *Packard* v. *Banton*, 264 U. S. 140, 144 (1924).

To hold otherwise, and create a First Amendment right of publishers to take city property to erect newsboxes, would ignore the significant governmental interests of cities—like Lakewood—that are threatened by newsrack placements.[7] One of these interests, discussed *supra*, at 780, is keeping the streets and sidewalks free for the use of all members of the public, and not just the exclusive use of any one entity. But this is not the only concern at issue here.

The Court has consistently recognized the important interest that localities have in insuring the safety of persons using city streets and public forums. See *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 650 (1981); *Grayned* v. *City of Rockford*, 408 U. S. 104, 115 (1972); *Cox* v. *New Hampshire*, 312 U. S., at 574. In this case, testimony at trial detailed a variety of potential safety risks posed by newsboxes, running the gamut from the obvious to the unimaginable.[8] Based on such testimony, the District Court found that newsracks "along the streets, . . . increas[e] the probability for accidents and injury." App. to Juris. Statement A32. This finding was not disturbed by the Court of Appeals, even as it reversed the District Court's constitutional ruling.

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[7] The conflict between cities' efforts to protect important public interests and the desire of publishers to place newsracks on city property no doubt accounts for the recent spate of litigation in the lower courts over the constitutionality of city regulation of newsracks. See, *e. g.*, *Gannett Satellite Information Network, Inc.* v. *Metropolitan Transportation Authority*, 745 F. 2d 767 (CA2 1984); *Miami Herald Publishing Co.* v. *Hallandale*, 734 F. 2d 666 (CA11 1984); *Providence Journal Co.* v. *City of Newport*, 665 F. Supp. 107 (RI 1987); *Gannett Satellite Information Network, Inc.* v. *Norwood*, 579 F. Supp. 108 (Mass. 1984); *City of New York* v. *American School Publications, Inc.*, 69 N. Y. 2d 576, 509 N. E. 2d 311 (1987); *Burlington* v. *New York Times Co.*, 148 Vt. 275, 532 A. 2d 562 (1987); *News Printing Co.* v. *Totowa*, 211 N. J. Super. 121, 511 A. 2d 139 (1986). See also Ball, Extra! Extra! Read All About It: First Amendment Problems in the Regulation of Coin-Operated Newspaper Vending Machines, 19 Colum. J. L. & Soc. Probs. 183, 185–187 (1985).

A third concern is the protection of cities' recognized esthetic interests. Lakewood and countless other American cities have invested substantial sums of money to renovate their urban centers and commercial districts. Increasingly, they find newsracks to be discordant with the surrounding area.[9] A majority of this Court found that similar esthetic considerations would be sufficient to justify a content-neutral ban on all outdoor advertising signs, notwithstanding the extent to which such signs convey First Amendment protected messages. See *Metromedia, Inc.* v. *San Diego,* 453 U. S. 490, 507–508 (1981) (plurality opinion); *id.*, at 552–553 (STEVENS, J., dissenting in part); *id.*, at 559–561 (Burger, C. J., dissenting); *id.*, at 570 (REHNQUIST, J., dissenting). This reasoning applies to newsracks as well as billboards. "[T]he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 71 (1976) (opinion of Stevens, J.). See also *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 806–807 (1984); *Kovacs* v. *Cooper*, 336 U. S. 77 (1949).

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[8] A city official testifying at trial reported numerous incidents where objects located in the sidewalk areas where appellee wishes to erect its newsboxes—signposts, signal poles, and utility poles—were hit by cars, bicycles, or pedestrians. App. 144–145. A vehicle may strike a newsrack on a city sidewalk, injuring its occupants or passersby. Cf. *Tua* v. *Brentwood Motor Coach Co.*, 371 Pa. 570, 92 A. 2d 209 (1952). Cars may stop so that their drivers can purchase papers from newsracks, increasing the traffic hazards of city driving. App. 89, 124–128.

Other testimony at trial and exhibits introduced there described newsracks restricting pedestrian traffic, blocking ramps for the handicapped, or being too near fire hydrants. *Id.*, at 151–154; Defendant's Exs. GG–1, GG–7, GG–9, App. 391–393. Even a one-on-one encounter with a seemingly benign newsrack has its risks. Cf. *McDermott* v. *Engstrom*, 81 So. 2d 553 (Fla. 1955). Indeed, appellee's newspaper reported recently that a man had received a serious electrical shock when he approached a newsrack, apparently resulting from the fact that the bolts used to anchor the newsrack to the ground had penetrated an electrical power line. See Are These Streets for Walking?, The Plain Dealer, July 3, 1987, p. 12-A, cols. 1–2; see also N. Y. Times, Nov. 14, 1986, p. A14, col. 5; Editor & Publisher, Apr. 16, 1983, p. 13, cols. 1–2.

We should be especially hesitant to recognize the right appellee claims where, as is the case here, there are "ample alternative channels" available for distributing newspapers. See *Arcara,* 478 U. S., at 705–706, n. 2; *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 53 (1983); *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976). The District Court found that no person in Lakewood lives more than one-quarter mile from a 24-hour newspaper outlet: either a store open all night or a newsbox located on private property.

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[9] One article introduced at trial in this case discussed growing frustration among local officials with rapidly escalating numbers of newsracks on city streets. See Longhini, Coping with High-Tech Headaches, 50 Planning Contents 31–32 (Mar. 1984). Esthetic problems are among the chief complaints. See *id.*, at 31.

Many other accounts have quoted city officials and city residents expressing dismay over newspaper distributors' seeming disregard for local esthetic concerns and standards. See, *e. g.*, Editor & Publisher, Sept. 8, 1984, p. 11, cols. 1–3; N. Y. Times, Aug. 22, 1984, p. A12, cols. 3–5; Editor & Publisher, May 28, 1983, p. 43, col. 1.

App. to Juris. Statement A27. Home delivery, the means by which appellee distributes the vast majority of its newspapers, *id.*, at A26, is an option as well. The First Amendment does not require Lakewood to make its property available to the Plain Dealer so that it may undertake the most effective possible means of selling newspapers. See *Heffron* v. *International Society for Krishna Consciousness, Inc.*, *supra*, at 647.

In sum, I believe that the First Amendment does not create a right of newspaper publishers to take a portion of city property to erect a structure to distribute their papers. There is no constitutional right to place newsracks on city sidewalks over the objections of the city.

C

Because there is no such constitutional right, the predicate for applying the *Freedman* v. *Maryland* line of cases, see *supra*, at 776–777, is not present in this case. Because the Lakewood ordinance does not directly regulate an activity protected by the First Amendment, we should instead take the traditional, as-applied approach to adjudication exemplified by the *Lieberman* line of cases. Appellee's facial challenge to the mayor's discretion under § 901.181(c)(7) should therefore be rejected.

The Court offers three reasons for departing from this time-tested approach for applying the *Lovell-Freedman* doctrine, and for substituting its new "nexus to expression" test. I consider these three reasons in turn.

(1)

First, the majority seeks support for its rejection of the foregoing analysis by comparing two previous decisions: *Saia* v. *New York*, 334 U. S. 558 (1948), and *Kovacs* v. *Cooper*, *supra*. *Saia* struck down a local ordinance vesting absolute discretion in a local official over permits for the use of sound-amplification trucks; *Kovacs* upheld a local law which totally banned the use of such trucks. Today's majority states that in *Kovacs, Saia* was distinguished on grounds that support its position here. *Ante*, at 764–766.

The majority's reading of these two cases is flawed for several reasons. First, the "rationale of *Kovacs*" on which the majority relies was not the Court's view at all, but rather, an opinion for a three-Justice plurality. See *Kovacs, supra*, at 78–89 (opinion of Reed, J.). In fact, four other Justices in *Kovacs* understood the Court's action in that case in the exact contrary manner—*i. e.*, as being a repudiation of the earlier decision in *Saia*. See *Kovacs*, 336 U. S., at 97–98 (Jackson, J., concurring); *id.*, at 101–102 (Black, Douglas, and Rutledge, JJ., dissenting). Thus, the majority's explanation of how a comparison of *Kovacs* and *Saia* support its conclusion rests on a view of those two cases that was rejected by more Justices than accepted it at the time that *Kovacs* was decided.

An equally plausible reading of *Saia* is the one that a plurality of Justices took when revisiting the sound-truck question in *Kovacs: Saia* rested on the "assumption"—later proved erroneous in *Kovacs*—that a municipality could not ban sound trucks altogether. *Saia* repeatedly suggests that a "ban" on sound trucks would not pass constitutional muster. See 334 U. S., at 562. Cf. also *id.*, at 559–560, 561. And the Court in *Saia* indicated that it was moved by its view that sound trucks were "indispensable instruments of effective public speech." *Id*, at 561.

Since *Saia*'s underlying premise was called into question in *Kovacs*, 336 U. S., at 97–98 (Jackson, J., concurring); *id.*, at 101–102 (Black, J., dissenting), at the very least, the majority's *Saia-Kovacs* comparison is a shaky foundation for the departure from prior precedent which the Court now undertakes.

(2)

Second, the Court incorrectly suggests that I rely on the now-discredited "greater-includes-the-lesser" formulation of Justice Holmes, as adopted by this Court in *Davis* v. *Massa-*

chusetts, 167 U. S. 43 (1897). *Ante*, at 762–766. The majority then engages in a detailed analysis of cases having no applicability here whatsoever, *ante*, at 766–767, to slay this straw man of its own creation.

As defined at its inception, "greater-includes-the-lesser" reasoning holds that where a State or municipality may ban an activity altogether, it is consequently free "to determine under what circumstances such [activity] may be availed of, as the greater power contains the lesser." See *Davis*, *supra*, at 48. But if, for example, a Lakewood ordinance provided for the issuance of newsrack licenses to only those newspapers owned by persons of a particular race, or only to members of a select political party, such a law would be clearly violative of the First Amendment (or some other provision of the Constitution), and would be facially invalid. And if the mayor of Lakewood granted or refused license applications for similar improper reasons, his exercise of the power provided him under § 901.181(c)(7) would be susceptible to constitutional attack. Thus, I do not embrace the "greater-includes-the-lesser" syllogism—one that this Court abandoned long ago. Cf. *Hague* v. *CIO*, 307 U. S., at 515.

Instead, my view is simply this: where an activity that could be forbidden altogether (without running afoul of the First Amendment) is subjected to a local license requirement, the mere presence of administrative discretion in the licensing scheme will not render it invalid *per se*. In such a case—which does not involve the exercise of First Amendment protected freedoms—the *Lovell-Freedman* doctrine does not apply, and our usual rules concerning the permissibility of discretionary local licensing laws (and facial challenges to those laws) must prevail.

(3)

Finally, the Court asserts that I do not understand the nature of the conduct at issue here. *Ante*, at 768. It is asserted that "[t]he actual 'activity' at issue here is the circulation of newspapers, which is constitutionally protected." *Ibid.* But of course, this is wrong. Lakewood does not, by its ordinance, seek to license the circulation of newspapers within the city. In fact, the Lakewood ordinance does not even require licenses of all newsracks within the jurisdiction—the many newsracks located within Lakewood on private property are *not* included within the scope of the city's ordinance. See App. 373–374. Thus, it is the majority—and not I—that is guilty of "recharacterizing" the activity that Lakewood licenses. The Lakewood ordinance must be considered for what it is: a license requirement for newsracks on city property.

This is why, notwithstanding the Court's intimations to the contrary, *ante,* at 766–769, my approach would not change the outcome of our previous cases in this area. In those cases the local law at issue required licenses—not for a narrow category of expressive conduct that could be prohibited—but for a sweeping range of First Amendment protected activity. Thus, the law at issue in *Shuttlesworth* v. *Birmingham,* 394 U. S., at 149, required a license for "any parade"; the license scheme under attack in *Freedman* v. *Maryland,* 380 U. S., at 52–53, and n. 1, applied to all films shown in the State of Maryland; the law at issue in *Lovell* v. *Griffin,* 303 U. S., at 451, applied to any distribution of leaflets or pamphlets within the city limits. Surely, even at the extreme level of abstraction at which the Court operates in its opinion, the majority can recognize a difference between the scope and dangers of these laws, and Lakewood's more focused regulation. See also n. 13, *infra.*

III

I now address the rule of decision the majority offers.

A

Instead of the relatively clear rule that the Court's prior cases support, the majority today adopts a more amorphous measure of when the *Lovell-Freedman* doctrine should apply.

As I see it, the Court's new "nexus to expression, or to conduct commonly associated with expression" test is peculiarly troublesome, because it is of uncertain scope and vague expanse.

The Court appears to stop short of saying that any statute that delegates discretionary administrative authority that has the *potential* to be used to suppress speech is unconstitutional. A great variety of discretionary power may be abused to limit freedom of expression; yet that does not mean that such delegations of power are facially invalid. See *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 503–504 (1982).[10]

The new Lakewood ordinance enacted in tandem with § 901.181 illustrates this principle well. As discussed, *ante*, at 753–754, when the District Court invalidated Lakewood's complete ban on all structures on city property (then § 901.18 of the city code), the city enacted two new ordinances. One, § 901.181, provides for licensing newsracks on city property—the subject of this appeal. The second, § 901.18, gives the City Council *unlimited* discretion to grant or deny applications for all other exclusive uses of city property. App. 266–267. Someone who wishes to apply for permission under § 901.18 to erect a soft-drink vending machine on city property may fear that his application will be denied because he has engaged in some First Amendment protected activities which are not to the City Council's liking. These fears may even be substantial, and they may be based on facts eminently provable in a courtroom; *e. g.*, that the applicant opposed a City Councilwoman in her last election campaign. Yet surely § 901.18 is not invalid on its face merely because it creates the *possibility* that the discretion accorded therein to the City Council could be abused in the way that the soft-drink vending machine applicant fears. Cf. *Grayned* v. *City of Rockford*, 408 U. S., at 121, n. 50; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 395–396 (1926).

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[10] For example, the power to hire and fire public employees can be abused to suppress discussion on matters of public concern, see, *e. g.*, *Rankin* v. *McPherson*, 483 U. S. 378 (1987), but that does not render facially invalid all laws that give public employers discretion to hire and fire. The plenary power given state public utility commissions to regulate local utilities too can be misused to infringe on protected speech rights, see *Pacific Gas & Electric Co.* v. *Public Utilities Comm'n of Cal.*, 475 U. S. 1, 10–15 (1986); *Consolidated Edison Co. of N. Y.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 533–535 (1980), but that does not render the statutes granting such regulatory power facially infirm. Even the power to grant or deny liquor licenses can be abused in violation of the First Amendment, cf. *Reed* v. *Village of Shorewood*, 704 F. 2d 943, 949–951 (CA7 1983), but this does not *per se* invalidate all local liquor laws.

Seeking a way to limit its own expansive ruling, the Court provides two concrete examples of instances in which its newly crafted "nexus to expression" rule will *not* strike down local ordinances that permit discretionary licensing decisions. First, we are told that a law granting unbridled discretion to a mayor to grant licenses for soda machine placements passes constitutional muster because it does not give that official "frequent opportunities to exercise substantial power over the content or viewpoint of the vendor's speech." *Ante*, at 761. How the Court makes this empirical assessment, I do not know. It seems to me that the nature of a vendor's product—be it newspapers or soda pop—is not the measure of how potent a license law can be in the hands of local officials seeking to control or alter the vendor's speech. Of course, the newspaper vendor's speech is likely to be more public, more significant, and more widely known than the soda vendor's speech—and therefore more likely to incur the wrath of public officials. *But* in terms of the "usefulness" of the license power to exert control over a licensee's speech, there is no difference whatsoever between the situation of the soda vendor and the newspaper vendor.[11]

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[11] Indeed, in practical terms, if two businesses contemplated the prospect of standing before Lakewood's officials to seek vending machine permits—a sole proprietorship seeking a license for a soda machine that is the only source of the owner's income, and the Plain Dealer Publishing Co. seeking

If the Court's treatment of the soda machine problem is not curious enough, it also "assures" us that its ruling does not invalidate local laws requiring, for example, building permits—even as they apply to the construction of newspaper printing facilities. These laws, we are told, provide "too blunt a censorship instrument to warrant judicial intervention." *Ante*, at 761. Thus, local "laws of general application that are not aimed at conduct commonly associated with expression" appear to survive the Court's decision today. *Ante*, at 760–761.

But what if Lakewood, following this decision, repeals local ordinance § 901.181 (the detailed newsrack permit law) and simply left § 901.18 (the general ordinance concerning "any . . . structure or device" on city property) on the books? That section vests absolute discretion (without any of the guidelines found in § 901.181) in the City Council to give or withhold permission for the erection of devices on city streets. Because this law is of "general application," it should survive scrutiny under the Court's opinion—even as applied to newsracks. If so, the Court's opinion takes on an odd "the-greater-but-not-the-lesser" quality: the more activities that are subjected to a discretionary licensing law, the more likely that law is to pass constitutional muster.

B

As noted above, our tradition has been to discourage facial challenges, and rather, to entertain constitutional attacks on local laws only as they are applied to the litigants. The facts of this case indicate why that policy is a prudent one.

Most importantly, there could be no allegation in this case that the mayor's discretion to deny permits *actually* has been abused to the detriment of the newspaper, for the Plain

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licenses for newsracks—I have little doubt about which applicant would be more likely to feel constrained to alter its expressive conduct in anticipation of the encounter.

Dealer has not applied for a permit for its newsracks under § 901.181. App. to Juris. Statement A30. Indeed, the District Court found that the "Mayor stands ready and willing to permit coin-operated newspaper dispensing devices in the commercial areas of the City" pursuant to the ordinance. *Ibid.* It also found that the "only reason why the [appellee] has not placed newspaper dispensing devices along the streets of Lakewood where permitted, is that the [appellee] has not applied for such use." *Id.*, at A32.

Indicative of the true nature of this litigation is the fact that the city of Lakewood has had on the books, since January 1987, an interim ordinance that licenses the placement of newsracks on city property—an ordinance that is free of the constitutional defects challenged here. Eighteen months have passed since the interim ordinance was enacted, and the Plain Dealer apparently still has not applied for a license to place its newsracks on city property.[12] Thus, the Court, with a strange rhetorical flourish, belittles the usefulness of judicial review as a tool to control the mayor's discretion in granting newsrack licenses, because newspaper publishers and their reading public cannot afford to await the results of the judicial process. *Ante*, at 771. "[N]ewspaper publishers can[not] wait indefinitely for a permit" and "a paper needs public access at a particular time," we are remonstrated. *Ante*, at 771–772. Yet the Plain Dealer has eschewed the availability of a wholly constitutional permit for its newsracks for a year and a half.

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[12] The discussion of the interim ordinance at oral argument highlights this point:

"QUESTION: Well, then, while [the interim] ordinance is in effect, have you gone ahead and installed some boxes?

"MR. GARNER [Appellees' Counsel]: No, we have not, Your Honor.

"QUESTION: Why not?

. . . . .

"MR. GARNER: We thought, as I suggested earlier, we think this is a very important case, and from the Plain Dealer's immediate standpoint certainly—

"QUESTION: In other words, you'd rather win the lawsuit then get the boxes out there.

"MR. GARNER: Yes, that's correct, Your Honor. . . ." Tr. of Oral Arg. 43–44.

See also n. 13, *infra* (comparing this case to *Freedman* v. *Maryland*, 380 U. S. 51 (1965), and *Shuttlesworth* v. *Birmingham*, 394 U. S. 147 (1969)).

The Court mentions the risk of censorship, the ever-present danger of self-censorship, and the power of prior restraint to justify the result. See, *e. g.*, *ante*, at 757–759, 767–768. Yet these fears and concerns have little to do with this case, which involves the efforts of Ohio's largest newspaper to place a handful of newsboxes in a few locations in a small suburban community. Even if one accepts the testimony of appellee's own expert, it seems unlikely that the newsboxes at issue here would increase the Plain Dealer's circulation within Lakewood by more than a percent or two; the paper's overall circulation would be affected only by about one one-hundredth of one percent (0.01%). See App. 82–84, 214.

It is hard to see how the Court's concerns have any applicability here. And it is harder still to see how the Court's image of the unbridled local censor, seeking to control and direct the content of speech, fits this case. In the case before us, the city of Lakewood declined to appeal an adverse ruling against its ban on newsracks, and instead amended its local laws to permit appellee to place its newsboxes on city property. See *id.*, at 270–274. When the nature of this ordinance was not to the Plain Dealer's liking, Lakewood again amended its local laws to meet the newspaper's concerns. See *id.*, at 275. Finally, when the newspaper, still disgruntled, won a judgment against Lakewood from the Court of Appeals, the city once again amended its ordinance to address the constitutional issues. See App. to Brief for Appellee A56–A59. The Court's David and Goliath imagery concerning the balance of power between the regulated and the regulator in this case is wholly inapt—except, possibly, in reverse.[13]

IV

Because, unlike the Court, I find that the Lakewood ordinance is not invalid by virtue of the discretion it vests in the city's mayor, I must reach the question whether the law is invalid for the other reasons the Court of Appeals cited. I conclude that it is not.

A

A similar analysis to the one I suggest in Parts II and III, *supra*, applies to Lakewood ordinance § 901.181(a), concerning the Architectural Review Board. Appellee argues that this ordinance provision, like the one giving discretion to the mayor to grant or deny permit applications, vests excessive and unbridled discretion in the Board, and thereby is violative of the First Amendment. But for the reasons that I concluded, *supra*, at 784, that § 901.181 does not directly regulate activity protected by the First Amendment, I think this facial challenge to the Architectural Review Board's role under the ordinance must fail as the challenge to § 901.181(c)(7) did. Section 901.181(a) does not fall simply because the Board *may* find a way to use its discretion to suppress speech.

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[13] It should be noted that several aspects of the particular ordinance at issue here diminish the possibility that it will result in the general abuses that the majority fears. These factors also distinguish the Lakewood ordinance from the local licensing laws under consideration in the cases that the Court relies on it its opinion.

First, unlike many regulatory schemes we have struck down in the past, cf., *e. g., Shuttlesworth* v. *Birmingham, supra*, at 149–150, 153, 157–158, § 901.181 requires that the mayor state the reasons for any denial of a newsrack permit application. This statement of reasons should facilitate review of the mayor's decision, and help to insure that it does not rest on an unconstitutional rationale.

Second, the availability of such review of mayoral decisions is another distinguishing aspect of the ordinance. Cf., *e. g., Staub* v. *City of Baxley*, 355 U. S., at 325. Section 901.181(e), allows (in the first instance) appeal to the City Council of any unfavorable mayoral decision. Then, if this appeal is unsuccessful, a dissatisfied applicant can seek relief from the Ohio courts under state law. Ohio Rev. Code Ann. § 2506.01 *et seq.* (Supp. 1987). These appeals provide assurance that any abuse of the mayor's discretion under the ordinance is unlikely to go unremedied.

Finally, the Court ignores the fact that the license that appellee seeks is not for conducting an activity (such as showing films or organizing a parade) for which a "most propitious opportunity for exhibition [may] pas[s]," *Freedman, supra*, at 61, but rather, for the erection of a semipermanent structure on city property. Thus, the administrative and judicial appeals processes made available by city and state laws can serve as a more effective check on the mayor's decisionmaking, with less of a burden on the permit-applicant, than was the case in *Freedman* or *Shuttlesworth.*

The fallacy of the Plain Dealer's argument to the contrary is exposed by considering its full implications. Under Lakewood Codified Ordinance § 1325.04, the Architectural Review Board has discretion to approve or reject designs for "*all* new construction . . . within the City." See App. 386 (emphasis added). If we were to accept the Plain Dealer's analysis that any potentially speech-suppressing discretion renders a local law facially invalid, we would have to strike § 1325.04 as well: after all, the Board could use its discretion under that ordinance to punish or chill the speech of any person in the city seeking to construct a new building.[14] Yet this mere possibility is not sufficient to invalidate § 1325.04. Likewise, the potential for abuse under § 901.181(a)—which simply subjects newsracks to the same architectural review applied to all other structures erected in Lakewood—is not sufficient to invalidate that provision either.

The First Amendment does not grant immunity to the Plain Dealer from the city's general laws regulating businesses that operate therein. "The publisher of a newspaper has no special immunity from the application of general laws." *Associated Press* v. *NLRB*, 301 U. S., at 132; see also, *e. g.*, *Citizen Publishing Co.* v. *United States*, 394 U. S. 131, 139 (1969); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 192–193 (1946). The District Court found that Lakewood has applied its architectural review process to *all* new construction in the city. App. to Juris. Statement A36. According to the city, bookstores, theaters, and churches under construction or renovation have all been required to obtain board approval for their construction. See Brief for Appellant 37–38. To hold that all structure where First Amendment protected activities take place are somehow exempt from this normal local regulation would be anomalous and contrary to our precedents. See *Young* v. *American Mini Theatres, Inc.*, 427 U. S., at 62.

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[14] Not only would Lakewood's ordinance fall to such a challenge, but so too would countless other local laws that grant Architectural Review Boards substantial discretion to approve the construction plans of applicants who may fear reprisal for the exercise of their First Amendment rights, or who wish to construct some structure in which First Amendment protected activities will take place. See App. B to Brief for National Institute of Municipal Law Officers as *Amicus Curiae*.

The Court of Appeals, 794 F. 2d 1139, 1146 (CA6 1986), thought it significant that the Board had no specific standards applying to newsrack designs, but rather, had only general architectural standards applicable to "buildings." Of course, this basis for disapproval is particularly ironic, since the "narro[w] and specifi[c]" focus of § 901.181 on the placement of newsracks is one reason why this Court finds that law to be suspect. *Ante*, at 760. Consequently, with respect to a future ordinance free from the defect the Court finds fault with today, the city of Lakewood finds itself between a rock and a hard place: make the rules newsrack-specific, and be accused of drawing the noose too tightly around First Amendment protected activities; apply more general rules to newsracks, and be told that your regulators lack standards sufficiently specific to pass constitutional muster.

The conundrum is unfortunate. Simply because a newspaper may find new ways to distribute its papers, via semipermanent structures that are not "buildings," should not permit the publisher to escape otherwise all-inclusive city regulation. Section 901.181(a) simply takes the rule that applies generally to all new structures in Lakewood and extends it to cover the structures at issue here: newsracks.

Newsracks have no First Amendment right to be placed on city streets with disregard for these important economic and esthetic concerns, or to contribute to the "visual blight" cities are working so hard to eradicate. See *Vincent*, 466 U. S., at 810.

Finally, the Court's opinion provides substantial support for the view that Lakewood's Architectural Review Board requirement *is* constitutional. As I noted, *supra*, at 790, the Court today holds that laws of general application are not invalid due to excessive discretion, even when they are applied to expressive activities. *Ante*, at 760–761. Since the architectural review requirement is such a law of general application, it appears to me that the Court's opinion implicitly sustains the constitutionality of the imposition of this requirement on appellee's newsboxes. Moreover, since this portion of the Lakewood ordinance only requires the approval of the Architectural Review Board on a single occasion, at the time of the initial adoption of a particular newsbox design, I think it is clearly encompassed within the Court's discussion of permissible building permit laws. *Ibid.*

B

The final disputed provision of the Lakewood ordinance, § 901.181(c)(5), requires that newsrack owners indemnify the city for "any and all liability . . . occasioned upon the installation and use" of any newsrack. It also requires newsrack permittees to obtain liability insurance in the amount of $100,000 to cover any such liability.

The city's reasons for imposing such requirements are obvious. Under Ohio law, a municipality has no sovereign immunity, and "is liable for its negligence in the performance or nonperformance of its acts." *Haverlack* v. *Portage Homes, Inc.*, 2 Ohio St. 3d 26, 30, 442 N. E. 2d 749, 752 (1982); cf. *Dickerhoof* v. *Canton*, 6 Ohio St. 3d 128, 451 N. E. 2d 1193 (1983). While there is some dispute between the parties as to how substantial is the city's risk of being held liable for an injury caused by a newsbox located on city property, there remains sufficient risk to suggest that avoiding such liability is a legitimate concern of Lakewood's City Council.

In fact, appellee acknowledges that, standing alone, the city's indemnification and insurance requirements would be constitutional; the Plain Dealer recognizes that there is no constitutional bar to requiring newspaper distributors to meet such requirements.[15] Nor does it argue that such insurance policies are unobtainable, or make the use of newsboxes economically infeasible.[16] Rather, appellee argues (and the Court of Appeals found), that this provision is invalid because it applies to newsracks and not other "users" of the public streets. 794 F. 2d, at 1147.

This Court has consistently held that "differential treatment . . . [for] the press . . . is presumptively unconstitutional." See *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, 585 (1983). Yet, in this case, I find this argument inapposite and unpersuasive. First, it ignores the obvious difference between those on-street objects that are essential to the public safety and welfare—such as bus shelters, telephone and electric wiring poles, and emergency phone boxes—and the preferred distribution means of a private newspaper company, the Plain Dealer's newsboxes. Judge Unthank, in concurrence below, recognized the difference between these "public services of a quasi-governmental nature," and appellee's newsracks. 794

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[15] The following excerpt from oral argument makes this point clear:

"QUESTION: [Y]ou assert that it is not possible under the First Amendment for the city to require indemnity insurance for those devices? I think that is a remarkable proposition.

"MR. GARNER [Appellee's Counsel]: No, I am not suggesting that, Your Honor. No. No, I am not suggesting that. . . . " Tr. of Oral Arg. 48.

[16] Nor could the Plain Dealer so argue. Lakewood introduced as exhibits at trial copies of $1 million liability insurance policies (10 times the amount required by ordinance § 901.181(c)(5)) that the Plain Dealer obtained for the benefit of 11 other cities in Ohio—including the city of Cleveland—where it has located newsracks on public property. App. 401.

F. 2d, at 1148. I also find the difference to be a significant one.[17]

Until this litigation ensued, a Lakewood ordinance banned the construction of any new structure on city property. The new ordinances adopted in response to the initial District Court decision below, which allow such structures, do explicitly require insurance from newsrack-permittee holders, while being silent on this question with respect to other potential permittees on public land. Compare § 901.181(c)(5) with § 901.18. But there is nothing in the record to suggest that the city would not require such insurance of any applicant under § 901.18. Cf. *Gannett Satellite Information Network, Inc.* v. *Metropolitan Transportation Authority*, 745 F. 2d 767, 773–774 (CA2 1984); see also *ante*, at 755, n. 3. If the city does begin to treat nonpress permittees more favorably than newsrack permittees, the Plain Dealer may have a valid constitutional challenge to § 901.181(c)(5) at that time. But I am unwilling to imply that such will be the city's practice based on the record before us. See *Renton* v. *Playtime Theatres, Inc.*, 475 U. S., at 53. Consequently, I would reject appellee's facial challenge to § 901.181(c)(5).

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[17] In addition, it may be beyond Lakewood's control to impose indemnity and insurance requirements on those entities that have structures on public property that predate the city's recent legislation. According to appellant, many of these placements of utility poles, signal boxes, and the like are on property obtained by utilities from the city via easement grants several decades old. See Tr. of Oral Arg. 28.

The city contended at argument (without dispute from the Plain Dealer) that it is Lakewood's policy to place indemnification and insurance requirements in all city rental contracts at this time. See *ibid.* Henceforth, then, the pre-existing nonindemnifying structures on city property will become the "isolated exceptions and not the rule." See *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, 583, n. 5 (1983); cf. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 193–194 (1946). Any future discriminatory application of what the city claims to be its current, uniform policy would, of course, be unconstitutional. See *Minneapolis Star*, *supra*, at 583–584.

V

For the foregoing reasons, I dissent from the Court's opinion and its judgment in this case. I would reverse the Court of Appeals' decision invalidating the Lakewood ordinance.

CHRISTIANSON ET AL. *v.* COLT INDUSTRIES OPERATING CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 87-499. Argued April 18, 1988—Decided June 17, 1988

The principal statutes involved in this case, which arises from a jurisdictional dispute between Courts of Appeals, are 28 U. S. C. § 1295(a)(1)—granting the Federal Circuit exclusive jurisdiction over an appeal from a final decision of a federal district court "if the jurisdiction of that court was based, in whole or in part, on" 28 U. S. C. § 1338—and § 1338(a), which grants the district courts original jurisdiction of any civil action "arising under" any federal statute relating to patents. Respondent (Colt), which is the leading manufacturer, seller, and marketer of M16 rifles and their parts and accessories, held and developed patents relating to the rifle, and has maintained the secrecy as to specifications essential to the mass production of interchangeable M16 parts. Petitioner Christianson, a former Colt employee, established a corporation (also a petitioner), and began selling M16 parts. Colt joined petitioners with other defendants in a patent-infringement lawsuit, but ultimately voluntarily dismissed its claims against petitioners. In the meantime, Colt notified several of petitioners' current and potential customers that petitioners were illegally misappropriating Colt's trade secrets, and urged them to refrain from doing business with petitioners. Petitioners then brought this antitrust action against Colt in Federal District Court for violations of §§ 1 and 2 of the Sherman Act. The complaint alleged, *inter alia*, that Colt's letters, litigation tactics, and other conduct drove petitioners out of business. Petitioners later amended the complaint to assert a second cause of action under state law for tortious interference with their business relationships. Colt asserted a defense that its conduct was justified by a need to protect its trade secrets and countersued on a variety of claims arising out of petitioners' alleged misappropriation of M16 patent specifications. Petitioners filed a motion for summary judgment raising a patent-law issue—related to the validity of Colt's patents—to which the complaint only obliquely hinted. The District Court awarded petitioners summary judgment as to liability on both the antitrust and the tortious-interference claims. On Colt's appeal, the Court of Appeals for the Federal Circuit held that it lacked jurisdiction and transferred the appeal to the Court of Appeals for the Seventh Circuit. The Seventh Circuit, however, raising the jurisdictional issue *sua sponte*, concluded that the Federal Circuit was "clearly wrong" and transferred the case back. The Federal Circuit, although concluding that the Seventh Circuit's jurisdictional decision was "clearly wrong," addressed the merits in the "interest of justice," and reversed the District Court.

Held:

1. The Court of Appeals for the Federal Circuit would not have jurisdiction of the appeal of a final judgment in this case under 28 U. S. C. § 1295(a)(1), since the action is not one "arising under" the patent statutes for purposes of § 1338(a). Pp. 807–813.

(a) In order to demonstrate that a case is one "arising under" federal patent law the plaintiff must set up some right, title, or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction, of those laws. Section 1338(a) jurisdiction extends only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims. A case raising a federal patent-law defense does not, for that reason alone, "arise under" patent law, even if the defense is anticipated in the complaint, and even if both parties admit that the defense is the only question truly at issue in the case. Nor is it necessarily sufficient that a well-pleaded claim alleges a single theory under which resolution of a patent-law question is essential. If on the face of a well-pleaded complaint there are reasons completely unrelated to the provisions and purposes of the patent laws why the plaintiff may or may not be entitled to the relief it seeks, then the claim does not "arise under" those laws. Pp. 807–810.

(b) Petitioners' antitrust count can readily be understood to encompass both a monopolization claim under § 2 of the Sherman Act and a group-boycott claim under § 1. The patent-law issue, while arguably necessary to at least one theory under each claim, is not necessary to the overall success of either claim. Even assuming, without deciding, that the validity of Colt's patents is an essential element of petitioners' monopolization theory rather than merely an argument in anticipation of a defense, the well-pleaded complaint rule focuses on claims, not theories, and just because an element that is essential to a particular theory might be governed by federal patent law does not mean that the entire monopolization claim "arises under" patent law. Examination of the complaint reveals that the monopolization theory (on which petitioners ultimately prevailed in the District Court) is only one of several involved, and the only one for which the patent-law issue is even arguably essential. Since there are reasons completely unrelated to the provisions and purposes of federal patent law why petitioners may or may not be entitled to the relief sought under their monopolization claim, the claim does not "arise under" federal patent law. The same analysis obtains as to petitioners' group-boycott claim under § 1 of the Sherman Act. Pp. 810–813.

2. Nor does reference to congressional policy compel a finding of Federal Circuit jurisdiction. One of Congress' objectives in creating the Federal Circuit was to reduce the lack of uniformity and uncertainty of legal doctrine in the administration of patent law. Although arguably Congress' goals might be better served if the Federal Circuit's jurisdiction were to be fixed by reference to the case actually litigated, nevertheless, Congress determined the relevant focus when it granted Federal Circuit jurisdiction on the basis of the district courts' jurisdiction. Since the latter courts' jurisdiction is determined by reference to the well-pleaded complaint, not the well-tried case, the referent for the Federal Circuit's jurisdiction must be the same. The legislative history of the Federal Circuit's jurisdictional provisions confirms that focus. Pp. 813–814.

3. Federal Circuit jurisdiction here cannot be based on Federal Rule of Civil Procedure 15(b) by deeming the complaint amended to encompass a new and independent cause of action—an implied cause of action under the patent laws. Even assuming that a court of appeals could furnish itself a jurisdictional basis under such theory, there is simply no evidence of any "express or implied consent" among the parties, as required by the Rule, to litigate a new patent-law claim. Although the summary judgment papers focused almost entirely on patent-law issues that petitioners deemed fundamental to the lawsuit, those issues fell squarely within the purview of the theories of recovery, defenses, and counterclaims that the pleadings already encompassed. Pp. 814–815.

4. There is no merit to the contention that the Federal Circuit was obliged to adopt the Seventh Circuit's analysis of the jurisdictional issue as the law of the case. The law-of-the-case doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions, and the policies supporting the doctrine apply with even greater force to transfer decisions than to decisions of substantive law. However, the Federal Circuit, in transferring the case to the Seventh Circuit, was the first to decide the jurisdictional issue. That the Federal Circuit did not explain its rationale is irrelevant. Thus, the law of the case was that the Seventh Circuit had jurisdiction, and it was the Seventh Circuit that departed from the law of the case. Moreover, the doctrine merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit on their power. Thus, even if the Seventh Circuit's decision was law of the case, the Federal Circuit

did not exceed its power in revisiting the jurisdictional issue, and once it concluded that the prior decision was "clearly wrong" it was obliged to decline jurisdiction. Most importantly, law of the case cannot bind this Court in reviewing decisions below. Pp. 815–818.

5. The Federal Circuit, after concluding that it lacked jurisdiction, erred in deciding to reach the merits anyway "in the interest of justice." Courts created by statute only have such jurisdiction as the statute confers. Upon concluding that it lacked jurisdiction, the Federal Circuit had authority, under 28 U. S. C. § 1631, to make a single decision—whether to dismiss the case or, "in the interest of justice," to transfer it to a court of appeals that has jurisdiction. The rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists has always worked injustice in particular cases—especially in the situation where, as here, the litigants are bandied back and forth between two courts, each of which insists that the other has jurisdiction. Such situations inhere in the very nature of jurisdictional lines, for few jurisdictional lines can be so finely drawn as to leave no room for disagreement on close cases. However, the courts of appeals should achieve the end of quick settlement of questions of transfer by adhering strictly to principles of law of the case. Under those principles, if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end. Pp. 818–819.

822 F. 2d 1544, vacated and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court. STEVENS, J., filed a concurring opinion, in which BLACKMUN, J., joined, *post*, p. 819.

Stuart R. Lefstein argued the cause for petitioners. With him on the briefs were *Spiro Bereveskos* and *John C. McNett*.

Anthony M. Radice argued the cause for respondent. With him on the brief were *Joseph C. Markowitz*, *Kim J. Landsman*, and *Robert L. Harmon*.

JUSTICE BRENNAN delivered the opinion of the Court.

This case requires that we decide a peculiar jurisdictional battle between the Court of Appeals for the Federal Circuit and the Court of Appeals for the Seventh Circuit. Each court has adamantly disavowed jurisdiction over this case. Each has transferred the case to the other. And each insists that the other's jurisdictional decision is "clearly wrong."

798 F. 2d 1051, 1056–1057 (CA7 1986); 822 F. 2d 1544, 1551, n. 7 (CA Fed. 1987). The parties therefore have been forced to shuttle their appeal back and forth between Chicago and the District of Columbia in search of a hospitable forum, ultimately to have the merits decided, after two years, by a Court of Appeals that still insists it lacks jurisdiction to do so.

I

Respondent Colt Industries Operating Corp. is the leading manufacturer, seller, and marketer of M16 rifles and their parts and accessories. Colt's dominant market position dates back to 1959, when it acquired a license for 16 patents to manufacture the M16's precursor. Colt continued to develop the rifle, which the United States Army adopted as its standard assault rifle, and patented additional improvements. Through various devices, Colt has also maintained a shroud of secrecy around certain specifications essential to the mass production of interchangeable M16 parts. For example, Colt's patents conceal many of the manufacturing specifications that might otherwise be revealed by its engineering drawings, and when Colt licenses others to manufacture M16 parts or hires employees with access to proprietary information, it contractually obligates them not to disclose specifications.

Petitioner Christianson is a former Colt employee who acceded to such a nondisclosure agreement. Upon leaving respondent's employ in 1975, Christianson established petitioner International Trade Services, Inc. (ITS), and began selling M16 parts to various customers domestically and abroad. Petitioners' business depended on information that Colt considers proprietary. Colt expressly waived its proprietary rights at least as to some of petitioners' early transactions. The precise scope of Colt's waiver is a matter of considerable dispute. In 1983, however, Colt joined petitioners as defendants in a patent-infringement lawsuit against two companies that had arranged a sale of M16's to El Salvador.

Evidence suggested that petitioners supplied the companies with certain M16 specifications, and Colt sought a court order enjoining petitioners from any further disclosures. When the District Court declined the motion, Colt voluntarily dismissed its claims against petitioners. In the meantime, Colt notified several of petitioners' current and potential customers that petitioners were illegally misappropriating Colt's trade secrets, and urged them to refrain from doing business with petitioners.

Three days after their dismissal from the lawsuit, petitioners brought this lawsuit in the District Court against Colt "pursuant to Section 4 . . . (15 U. S. C. § 15) and Section 16 of the Clayton Act (15 U. S. C. § 26) for damages, injunctive and equitable relief by reason of its violations of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1 & 2) . . . ." App. 7. The complaint alleged that Colt's letters, litigation tactics, and "[o]the[r] . . . conduct" drove petitioners out of business. In that context, petitioners included the following obscure passage:

> "18. The validity of the Colt patents had been assumed throughout the life of the Colt patents through 1980. Unless such patents were invalid through the wrongful retention of proprietary information in contravention of United States Patent Law (35 U. S. C. § 112), in 1980, when such patents expired, anyone 'who has ordinary skill in the rifle-making art' is able to use the technology of such expired patents for which Colt earlier had a monopoly position for 17 years.
>
> "19. ITS and anyone else has the right to manufacture, contract for the manufacture, supply, market and sell the M–16 and M–16 parts and accessories thereof at the present time." *Id.*, at 9.

Petitioners later amended their complaint to assert a second cause of action under state law for tortious interference with their business relationships. Colt interposed a defense that its conduct was justified by a need to protect its trade secrets and countersued on a variety of claims arising out of petitioners' alleged misappropriation of M16 specifications.

Petitioners' motion for summary judgment raised only a patent-law issue obliquely hinted at in the above-quoted paragraphs—that Colt's patents were invalid from their inception for failure to disclose sufficient information to "enable any person skilled in the art . . . to make and use the same" as well as a description of "the best mode contemplated by the inventor of carrying out his invention." 35 U. S. C. § 112. Since Colt benefited from the protection of the invalid patents, the argument continues, the "trade secrets" that the patents should have disclosed lost any state-law protection. Petitioners therefore argued that the District Court should hold that "Colt's trade secrets are invalid and that [their] claim of invalidity shall be taken as established with respect to all claims and counterclaims to which said issue is material." App. 58.

The District Court awarded petitioners summary judgment as to liability on both the antitrust and the tortious-interference claims, essentially relying on the § 112 theory articulated above. In the process, the District Court invalidated nine of Colt's patents, declared all trade secrets relating to the M16 unenforceable, enjoined Colt from enforcing "any form of trade secret right in any technical information relating to the M16," and ordered Colt to disgorge to petitioners all such information. 613 F. Supp. 330, 332 (CD Ill. 1985).

Respondent appealed to the Court of Appeals for the Federal Circuit, which, after full briefing and argument, concluded that it lacked jurisdiction and issued an unpublished order transferring the appeal to the Court of Appeals for the Seventh Circuit. See 28 U. S. C. § 1631. The Seventh Circuit, however, raising the jurisdictional issue *sua sponte*, concluded that the Federal Circuit was "clearly wrong" and transferred the case back. 798 F. 2d, at 1056–1057, 1062.

The Federal Circuit, for its part, adhered to its prior jurisdictional ruling, concluding that the Seventh Circuit exhibited "a monumental misunderstanding of the patent jurisdiction granted this court," 822 F. 2d, at 1547, and was "clearly wrong," *id.*, at 1551, n. 7. Nevertheless, the Federal Circuit proceeded to address the merits in the "interest of justice," *id.*, at 1559–1560, and reversed the District Court. We granted certiorari, 484 U. S. 985 (1987), and now vacate the judgment of the Federal Circuit.

II

As relevant here, 28 U. S. C. § 1295(a)(1) grants the Court of Appeals for the Federal Circuit exclusive jurisdiction over "an appeal from a final decision of a district court of the United States . . . if the jurisdiction of that court was based, in whole or in part, on [28 U. S. C.] section 1338 . . . ."[1] Section 1338(a), in turn, provides in relevant part that "[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents . . . ." Thus, the jurisdictional issue before us turns on whether this is a case "arising under" a federal patent statute, for if it is then the jurisdiction of the District Court was based at least "in part" on § 1338.

A

In interpreting § 1338's precursor, we held long ago that in order to demonstrate that a case is one "arising under" federal patent law "the plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction of these laws." *Pratt* v. *Paris Gas Light & Coke Co.*, 168 U. S. 255, 259 (1897). See *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, 16 (1912). Our cases interpreting identical language in other jurisdictional provisions, particularly the general federal-question provision, 28 U. S. C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"), have quite naturally applied the same test.[2] See *Gully* v. *First National Bank in Meridian*, 299 U. S. 109, 112 (1936) (the claim alleged in the complaint "must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another") (citations omitted). A district court's federal-question jurisdiction, we recently explained, extends over "only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law," *Franchise Tax Board of California* v. *Construction Laborers Vacation Trust*, 463 U. S. 1, 27–28 (1983), in that "federal law is a necessary element of one of the well-pleaded . . . claims," *id.*, at 13. Linguistic consistency, to which we have historically adhered, demands that § 1338(a) jurisdiction likewise extend only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims. See 822 F. 2d, at 1553–1556; 798 F. 2d, at 1059–1061.

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[1] Colt's appeal to the Federal Circuit actually invoked 28 U. S. C. §§ 1292(a)(1) and (c)(1), which together grant the Federal Circuit exclusive jurisdiction over appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving [an] injunctio[n]," § 1292(a)(1), "in any case over which the court would have jurisdiction over an appeal under section 1295," § 1292(c)(1).

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[2] Colt correctly points out that in this case our interpretation of § 1338(a)'s "arising under" language will merely determine which of two federal appellate courts will decide the appeal, and suggests that our "arising under" jurisprudence might therefore be inapposite. Since, however, § 1338(a) delineates the jurisdiction of the federal and state courts over cases involving patent issues, the phrase (like the identical phrase in § 1331) "masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." See *Franchise Tax Board of California* v. *Construction Laborers Vacation Trust*, 463 U. S. 1, 8 (1983) (footnote omitted). See also *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U. S. 804, 810 (1986) ("[D]eterminations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system").

The most superficial perusal of petitioners' complaint establishes, and no one disputes, that patent law did not in any sense create petitioners' antitrust or intentional-interference claims. Since no one asserts that federal jurisdiction rests on petitioners' state-law claims, the dispute centers around whether patent law "is a necessary element of one of the well-pleaded [antitrust] claims." See *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U. S. 804, 813 (1986). Our cases, again mostly in the § 1331 context, establish principles for both defining the "well-pleaded . . . claims" and discerning which elements are "necessary" or "essential" to them. Under the well-pleaded complaint rule, as appropriately adapted to § 1338(a), whether a claim "arises under" patent law "'must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.'" *Franchise Tax Board, supra*, at 10 (quoting *Taylor* v. *Anderson*, 234 U. S. 74, 75–76 (1914)). See *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149 (1908). Thus, a case raising a federal patent-law defense does not, for that reason alone, "arise under" patent law, "even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Franchise Tax Board, supra*, at 14.[3] See also *Merrell Dow, supra*, at 808.

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[3] On the other hand, merely because a claim makes no reference to federal patent law does not necessarily mean the claim does not "arise under" patent law. Just as "a plaintiff may not defeat removal by omitting to

Nor is it necessarily sufficient that a well-pleaded claim alleges a single theory under which resolution of a patent-law question is essential. If "on the face of a well-pleaded complaint there are . . . reasons completely unrelated to the provisions and purposes of [the patent laws] why the [plaintiff] may or may not be entitled to the relief it seeks," *Franchise Tax Board*, 463 U. S., at 26 (footnote omitted), then the claim does not "arise under" those laws. See *id.*, at 26, n. 29. Thus, a claim supported by alternative theories in the complaint may not form the basis for § 1338(a) jurisdiction unless patent law is essential to each of those theories.

B

Framed in these terms, our resolution of the jurisdictional issue in this case is straightforward. Petitioners' antitrust count can readily be understood to encompass both a monopolization claim under § 2 of the Sherman Act and a group-boycott claim under § 1. The patent-law issue, while arguably necessary to at least one theory under each claim, is not necessary to the overall success of either claim.

Section 2 of the Sherman Act condemns "[e]very person who shall monopolize, or attempt to monopolize . . . ." 15 U. S. C. § 2. The thrust of petitioners' monopolization claim is that Colt has "embarked on a course of conduct to illegally extend its monopoly position with respect to the described patents and to prevent ITS from engaging in any business with respect to parts and accessories of the M–16." App. 10. The complaint specifies several acts, most of which relate either to Colt's prosecution of the lawsuit against petitioners or to letters Colt sent to petitioners' potential and existing customers. To make out a § 2 claim, petitioners would

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plead necessary federal questions in a complaint," *Franchise Tax Board*, *supra*, at 22 (citations omitted); see *Federated Department Stores, Inc.* v. *Moitie*, 452 U. S. 394, 397, n. 2 (1981); *id.*, at 408, n. 3 (BRENNAN, J., dissenting), so a plaintiff may not defeat § 1338(a) jurisdiction by omitting to plead necessary federal patent-law questions.

have to present a theory under which the identified conduct amounted to a "willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell Corp.*, 384 U. S. 563, 570–571 (1966). Both the Seventh Circuit and Colt focus entirely on what they perceive to be "the only basis Christianson asserted in the complaint for the alleged antitrust violation," 798 F. 2d, at 1061; see Brief for Respondent 32—namely, that Colt made false assertions in its letters and pleadings that petitioners were violating its trade secrets, when those trade secrets were not protected under state law because Colt's patents were invalid under § 112. Thus, Colt concludes, the validity of the patents is an essential element of petitioners' prima facie monopolization theory and the case "arises under" patent law.

We can assume without deciding that the invalidity of Colt's patents is an essential element of the foregoing monopolization theory rather than merely an argument in anticipation of a defense. But see 822 F. 2d, at 1547. The well-pleaded complaint rule, however, focuses on claims, not theories, see *Franchise Tax Board, supra,* at 26, and n. 29; *Gully*, 299 U. S., at 117, and just because an element that is essential to a particular theory might be governed by federal patent law does not mean that the entire monopolization claim "arises under" patent law.

Examination of the complaint reveals that the monopolization theory that Colt singles out (and on which petitioners ultimately prevailed in the District Court) is only one of several, and the only one for which the patent-law issue is even arguably essential. So far as appears from the complaint, for example, petitioners might have attempted to prove that Colt's accusations of trade-secret infringement were false not because Colt had no trade secrets, but because Colt authorized petitioners to use them. App. 9–10 ("Contrary to the permission extended to ITS to sell Colt parts and accessories and in violation of the anti-trust laws . . . Colt has embarked upon a course of conduct . . . to prevent ITS from engaging in any business with respect to parts and accessories of the M–16"). In fact, most of the conduct alleged in the complaint could be deemed wrongful quite apart from the truth or falsity of Colt's accusations. According to the complaint, Colt's letters also (1) contained "copies of inapplicable court orders" and "suggest[ed] that these court orders prohibited [the recipients] from doing business with" petitioners; and (2) "falsely stat[ed] that 'Colt's right' to proprietary data had been 'consistently upheld in various courts.'" *Id.*, at 10. Similarly, the complaint alleges that Colt's lawsuit against petitioners (1) was designed "to contravene the permission previously given"; (2) was "[p]ursued . . . in bad faith by subjecting [petitioners] to substantial expense in extended discovery procedures"; and (3) was brought only to enable Colt "to urge customers and potential customers of [petitioners] to refrain from doing business with them." *Id.*, at 10–11. Since there are "reasons completely unrelated to the provisions and purposes" of federal patent law why petitioners "may or may not be entitled to the relief [they] see[k]" under their monopolization claim, *Franchise Tax Board*, *supra*, at 26 (footnote omitted), the claim does not "arise under" federal patent law.

The same analysis obtains as to petitioners' group-boycott claim under § 1 of the Sherman Act, which provides that "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . is declared to be illegal," 15 U. S. C. § 1. This claim is set forth in the allegation that "virtually all suppliers of ITS and customers of ITS have agreed with Colt to refrain from supplying and purchasing M–16 parts and accessories to or from ITS, which has had the effect of requiring ITS to close its doors and no longer transact business." App. 11. As this case unfolded, petitioners attempted to prove that the alleged agreement was unreasonable because its purpose was to protect Colt's trade secrets from petitioners' infringement and, given the patents' invalidity under § 112, Colt had no trade secrets to infringe. Whether or not the patent-law issue was an "essential" element of that group-boycott *theory*, however, petitioners could have supported their group-boycott *claim* with any of several theories having nothing to do with the validity of Colt's patents. Equally prominent in the complaint, for example, is a theory that the alleged agreement was unreasonable not because Colt had no trade secrets to protect, but because Colt authorized petitioners to use them. Once again, the appearance on the complaint's face of an alternative, nonpatent theory compels the conclusion that the group-boycott claim does not "arise under" patent law.

III

Colt offers three arguments for finding jurisdiction in the Federal Circuit, notwithstanding the well-pleaded complaint rule. The first derives from congressional policy; the second is based on Federal Rule of Civil Procedure 15(b); and the third is grounded in principles of the law of the case. We find none of them persuasive.

A

Colt correctly observes that one of Congress' objectives in creating a Federal Circuit with exclusive jurisdiction over certain patent cases was "to reduce the widespread lack of uniformity and uncertainty of legal doctrine that exist[ed] in the administration of patent law." H. R. Rep. No. 97–312, p. 23 (1981). Colt might be correct (although not clearly so) that Congress' goals would be better served if the Federal Circuit's jurisdiction were to be fixed "by reference to the case actually litigated," rather than by an *ex ante* hypothetical assessment of the elements of the complaint that might have been dispositive. Brief for Respondent 31. Congress determined the relevant focus, however, when it granted jurisdiction to the Federal Circuit over "an appeal from . . . a district court . . . if the jurisdiction of *that court* was based . . . on section 1338." 28 U. S. C. § 1295(a)(1) (emphasis added). Since the district court's jurisdiction is determined by reference to the well-pleaded complaint, not the well-tried case, the referent for the Federal Circuit's jurisdiction must be the same. The legislative history of the Federal Circuit's jurisdictional provisions confirms that focus. See, *e. g.*, H. R. Rep. No. 97–312, *supra*, at 41 (cases fall within the Federal Circuit's patent jurisdiction "in the same sense that cases are said to 'arise under' federal law for purposes of federal question jurisdiction"). In view of that clear congressional intent, we have no more authority to read § 1295(a)(1) as granting the Federal Circuit jurisdiction over an appeal where the well-pleaded complaint does not depend on patent law, than to read § 1338(a) as granting a district court jurisdiction over such a complaint. See *Pratt*, 168 U. S., at 259.

B

Colt suggests alternatively that under Federal Rule of Civil Procedure 15(b)[4] we should deem the complaint amended to encompass a new and independent cause of action—"an implied cause of action under section 112 of the patent laws." Brief for Respondent 28. Such a cause of action, which Colt finds in petitioners' summary judgment papers, would plainly "arise under" the patent laws, regardless of its merit. See 822 F. 2d, at 1566 (Nichols, J., concurring and dissenting).

We need not decide under what circumstances, if any, a court of appeals could furnish itself a jurisdictional basis unsupported by the pleadings by deeming the complaint amended in light of the parties' "express or implied consent" to litigate a claim. Fed. Rule Civ. Proc. 15(b). In this case there is simply no evidence of any consent among the parties to litigate the new patent-law claim that Colt imputes to petitioners. Colt points to nothing in petitioners' summary judgment motion expressly raising such a new cause of action, much less anything in its own motion papers suggesting consent to one. See App. 57–58. True, the summary judgment papers focused almost entirely on the patent-law issues, which petitioners deemed "[b]asic and fundamental to the subject lawsuit." *Id.*, at 57. But those issues fell squarely within the purview of the theories of recovery, defenses, and counterclaims that the pleadings already encompassed. Petitioners recognized as much when they moved the District Court to hold that their "claim of [patent] invalidity shall be taken as established with respect to all claims and counterclaims to which said issue is material." *Id.*, at 58. Thus, the patent-law focus of the summary judgment papers hardly heralded the assertion of a new patent-law claim. See, *e. g.*, *Quillen* v. *International Playtex, Inc.*, 789 F. 2d 1041, 1044 (CA4 1986); 6 C. Wright & A. Miller, Federal Practice and Procedure § 1493, p. 466 (1971). Moreover, the District Court never intimated that the patent issues were relevant to any cause of action other than the antitrust and intentional-interference claims raised expressly in the complaint; the court four times linked its judgment to "liability on Counts I and II," without any reference to the hypothetical Count III that Colt imputes to petitioners. 609 F. Supp. 1174, 1185 (CD Ill. 1985) See also 613 F. Supp., at 332.

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[4] Rule 15(b) provides in relevant part:

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues."

C

Colt's final argument is that the Federal Circuit was obliged not to revisit the Seventh Circuit's thorough analysis of the jurisdictional issue, but merely to adopt it as the law of the case. See also 822 F. 2d, at 1565 (Nichols, J., concurring and dissenting). "As most commonly defined, the doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona* v. *California*, 460 U. S. 605, 618 (1983) (dictum). This rule of practice promotes the finality and efficiency of the judicial process by "protecting against the agitation of settled issues." 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice ¶0.404[1], p. 118 (1984) (hereinafter Moore's).

Colt is correct that the doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions. See, *e. g.*, *Kori Corp.* v. *Wilco Marsh Buggies & Draglines, Inc.*, 761 F. 2d 649, 657 (CA Fed.), cert. denied, 474 U. S. 902 (1985); *Perkin-Elmer Corp.* v. *Computervision Corp.*, 732 F. 2d 888, 900–901 (CA Fed.), cert. denied, 469 U. S. 857 (1984). Federal courts routinely apply law-of-the-case principles to transfer decisions of coordinate courts. See, *e. g.*, *Hayman Cash Register Co.* v. *Sarokin*, 669 F. 2d 162, 164–170 (CA3 1982) (transfer under 28 U. S. C. §1406(a)); *Skil Corp.* v. *Millers Falls Co.*, 541 F. 2d 554, 558–559 (CA6) (alternative holding) (transfer under 28 U. S. C. §1404(a)), cert. denied, 429 U. S. 1029 (1976); 1B Moore's ¶¶0.404[4.–5], 0.404[8]. Cf. *Hoffman* v. *Blaski*, 363 U. S. 335, 340–341, n. 9 (1960) (res judicata principles did not limit power of Court of Appeals to reconsider transfer decision not upset by coordinate court). Indeed, the policies supporting the doctrine apply with even greater force to transfer decisions than to decisions of substantive law; transferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation. See *Hayman*, *supra*, at 169; *Chicago & N. W. Transp. Co.* v. *United States*, 574 F. 2d 926, 930 (CA7 1978). Cf. *Blaski*, *supra*, at 348–349 (Frankfurter, J., dissenting).[5]

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[5] There is no reason to apply law-of-the-case principles less rigorously to transfer decisions that implicate the transferee's jurisdiction. Perpetual litigation of any issue—jurisdictional or nonjurisdictional—delays, and

Colt's conclusion that jurisdiction therefore lay in the Federal Circuit is flawed, however, for three reasons. First, the Federal Circuit, in transferring the case to the Seventh Circuit, was the first to decide the jurisdictional issue. That the Federal Circuit did not explicate its rationale is irrelevant, for the law of the case turns on whether a court previously "decide[d] upon a rule of law"—which the Federal Circuit necessarily did—not on whether, or how well, it explained the decision. Thus, the law of the case was that the Seventh Circuit had jurisdiction, and it was the Seventh Circuit, not the Federal Circuit, that departed from the law of the case. Second, the law-of-the-case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger* v. *Anderson,* 225 U. S. 436, 444 (1912) (Holmes, J.) (citations omitted). A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was "clearly erroneous and would work a manifest injustice." *Arizona* v. *California, supra,* at 618, n. 8 (citation omitted). Thus, even if the Seventh Circuit's decision was law of the case, the Federal Circuit did not exceed its power in revisiting the jurisdictional issue, and once it concluded that the prior decision was "clearly wrong" it was obliged to decline jurisdiction. Most importantly, law of the case cannot bind this Court in reviewing decisions below. A petition for writ of certiorari can expose the entire case to review. *Panama R. Co.* v. *Napier Shipping Co.,* 166 U. S. 280, 283–284 (1897). Just as a district court's adherence to law of the case cannot insulate an issue from appellate review, a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review. See *Mes-*

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therefore threatens to deny, justice. But cf. *Potomac Passengers Assn.* v. *Chesapeake & Ohio R. Co.,* 171 U. S. App. D. C. 359, 363, n. 22, 520 F. 2d 91, 95, n. 22 (1975).

senger, supra, at 444; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.,* 240 U. S. 251, 257–259 (1916).

IV

Our agreement with the Federal Circuit's conclusion that it lacked jurisdiction, compels us to disapprove of its decision to reach the merits anyway "in the interest of justice." 822 F. 2d, at 1559. "Courts created by statute can have no jurisdiction but such as the statute confers." *Sheldon* v. *Sill,* 8 How. 441, 449 (1850). See also *Firestone Tire & Rubber Co.* v. *Risjord,* 449 U. S. 368, 379–380 (1981). The statute confers on the Federal Circuit authority to make a single decision upon concluding that it lacks jurisdiction—whether to dismiss the case or, "in the interest of justice," to transfer it to a court of appeals that has jurisdiction. 28 U. S. C. § 1631.

The age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists has always worked injustice in particular cases. Parties often spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction. Even more exasperating for the litigants (and wasteful for all concerned) is a situation where, as here, the litigants are bandied back and forth helplessly between two courts, each of which insists the other has jurisdiction. Such situations inhere in the very nature of jurisdictional lines, for as our cases aptly illustrate, few jurisdictional lines can be so finely drawn as to leave no room for disagreement on close cases. See, *e. g., K mart Corp.* v. *Cartier, Inc.,* 485 U. S. 176 (1988); *United States* v. *Hohri,* 482 U. S. 64 (1987).

That does not mean, however, that every borderline case must inevitably culminate in a perpetual game of jurisdictional ping-pong until this Court intervenes to resolve the underlying jurisdictional dispute, or (more likely) until one of the parties surrenders to futility. Such a state of affairs would undermine public confidence in our judiciary, squander private and public resources, and commit far too much of this Court's calendar to the resolution of fact-specific jurisdictional disputes that lack national importance. "Surely a seemly system of judicial remedies . . . regarding controverted transfer provisions of the United States Code should encourage, not discourage, quick settlement of questions of transfer . . . ." *Blaski*, 363 U. S., at 349 (Frankfurter, J., dissenting). The courts of appeals should achieve this end by adhering strictly to principles of law of the case. See *supra*, at 816. Situations might arise, of course, in which the transferee court considers the transfer "clearly erroneous." *Arizona* v. *California*, 460 U. S., at 618, n. 8. But as "[t]he doctrine of the law of the case is . . . a heavy deterrent to vacillation on arguable issues," 1B Moore's ¶0.404[1], at 124, such reversals should necessarily be exceptional; courts will rarely transfer cases over which they have clear jurisdiction, and close questions, by definition, never have clearly correct answers. Under law-of-the-case principles, if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end. See *Fogel* v. *Chestnutt*, 668 F. 2d 100, 109 (CA2 1981) ("The law of the case will be disregarded only when the court has 'a clear conviction of error'") (citation omitted), cert. denied, 459 U. S. 828 (1982). While adherence to the law of the case will not shield an incorrect jurisdictional decision should this Court choose to grant review, see *supra*, at 817–818, it will obviate the necessity for us to resolve every marginal jurisdictional dispute.

We vacate the judgment of the Court of Appeals for the Federal Circuit and remand with instructions to transfer the case to the Court of Appeals for the Seventh Circuit. See 28 U. S. C. §1631.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, concurring.

In a seminal case construing federal-question jurisdiction, Justice Cardozo wrote that "[w]hat is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation . . . a selective process which picks the substantial causes out of the web and lays the other ones aside." *Gully* v. *First National Bank in Meridian,* 299 U. S. 109, 117–118 (1936). Although I agree with the Court's conclusion in this case that appellate jurisdiction is in the Seventh Circuit rather than the Federal Circuit, I write separately to emphasize that a common-sense application of Justice Cardozo's dictum requires that the answer to the question whether a claim arises under the patent laws may depend on the time when the question is asked. More specifically, if the question is asked at the end of a trial in order to decide whether the Federal Circuit has appellate jurisdiction, the answer may be different than if it had been asked at the outset to decide whether a federal district court has jurisdiction to try the case.

When Congress passed the Federal Courts Improvement Act in 1982 and vested exclusive jurisdiction in the Court of Appeals for the Federal Circuit to resolve appeals of claims that had arisen under the patent laws in the federal district courts, it was responding to concerns about both the lack of uniformity in federal appellate construction of the patent laws and the forum-shopping that such divergent appellate views had generated. Nonetheless, its definition of the Federal Circuit's jurisdiction did not embrace all cases in which a district court had decided a patent-law question. Instead, it adopted a standard that requires the appellate court to decide whether the jurisdiction of the district court was based, in whole or in part, on a claim "arising under" the patent laws.[1]

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[1] Title 28 U. S. C. § 1295(a)(1) grants the Federal Circuit appellate jurisdiction over final decisions of federal district courts whose jurisdiction "was based, in whole or in part, on section 1338 of this title." Title 28 U. S. C. § 1338(a), in turn, grants the federal district courts "original jurisdiction of any civil action arising under any Act of Congress relating to pat-

The question whether a claim arises under the patent laws is similar to the question whether a claim arises under federal law. Although there is no single, precise, all-embracing definition of either body of law, the "vast majority" of cases that come within either "grant of jurisdiction are covered by Justice Holmes' statement that a 'suit arises under the law that creates the cause of action.' Thus, the vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action." *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U. S. 804, 808 (1986) (citation omitted). In this case it is clear that the causes of action asserted by petitioners were created by the antitrust laws and not the patent laws. Congress did not create an express cause of action to enforce § 112 of the patent laws, and I find no merit in respondent's suggestion that we should recognize an implied cause of action under § 112. Accordingly, I agree with the Court's conclusion that the issue of wrongful retention of proprietary information that became the focus of this case under § 112 of the patent laws could not confer appellate jurisdiction in the Federal Circuit, because the issue arose as a defense rather than as a claim.[2]

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ents . . . ." As the Court correctly states, *ante*, at 807–810, § 1338 jurisdiction, like § 1331 jurisdiction, is over claims, not issues. See H. R. Rep. No. 97–312, p. 41 (1981) ("Cases will be within the jurisdiction of the Court of Appeals for the Federal Circuit in the same sense that cases are said to 'arise under' federal law for purposes of federal question jurisdiction. *Contrast, Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F. 2d 179 (2d Cir., 1979) [Temporary Emergency Court of Appeals properly has jurisdiction over *issues*, not *claims*, arising under the Economic Stabilization Act]").

In this context, it is important to note that the "well-pleaded complaint" rule helps ferret out claims from issues, and says nothing about whether such separation should be made only on the basis of the original complaint.

[2] Indeed, since it seems plain that no implied cause of action exists under § 112—which, after all, merely describes the nature of the specifications that must be included with a patent application—a plaintiff's attempt at gaining federal-court jurisdiction through a claim arising under § 112

To the extent that Part III–A of the Court's opinion does nothing more than abjure the notion that the Federal Circuit has jurisdiction over patent-law issues as well as claims, I am thus in complete agreement. However, in rejecting respondent's contention that "Congress' goals would be better served if the Federal Circuit's jurisdiction were to be fixed 'by reference to the case actually litigated,' rather than by an *ex ante* hypothetical assessment of the elements of the complaint that might have been dispositive," *ante*, at 813, the Court's opinion might be read as suggesting that whether patent claims are properly before the Federal Circuit on appeal should be determined by examining only the initial complaint and not by ascertaining whether a patent claim in fact was litigated in the case. Such an approach would assume that whether a case "arises under" the patent laws turns on the same considerations whether one is determining the Federal Circuit's appellate jurisdiction or a federal district court's original jurisdiction. But although 28 U. S. C.

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would be properly rejected under the "artful pleading" doctrine. See, *e. g., Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667, 673–674 (1950) ("To sanction suits for declaratory relief as within the jurisdiction of the District Courts merely because, as in this case, artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purpose of the Declaratory Judgment Act"); *Federated Department Stores, Inc.* v. *Moitie*, 452 U. S. 394, 397, n. 2 (1981) (District Court properly found that respondents "had attempted to avoid removal jurisdiction by 'artful[ly]' casting their 'essentially federal law claims' as state-law claims"); *Caterpillar Inc.* v. *Williams*, 482 U. S. 386, 397 (1987) ("artful pleading" doctrine cannot be invoked by party attempting to justify removal on the basis of facts not alleged in the complaint); 14A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3722, pp. 266–276 (1985); see also *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U. S. 804 (1986) (incorporation of federal standard in state-law private action, when no cause of action, either express or implied, exists for violations of that federal standard, does not make the action one "arising under the Constitution, laws, or treaties of the United States").

§ 1338(a) provides the basis for both types of jurisdictional assessment, I think it clear that Congress could not have intended precisely the same analysis in both instances. Two simple examples will illustrate the point.

If a patentee should file a two-count complaint seeking damages (1) under the antitrust laws and (2) for patent infringement, the district court's jurisdiction would unquestionably be based, at least in part, on § 1338(a). If, however, pretrial discovery convinced the plaintiff that no infringement had occurred, and Count 2 was therefore dismissed voluntarily in advance of trial, the case that would actually be litigated would certainly not arise under the patent laws for purposes of appellate jurisdiction. Even though the district court's original jurisdiction when the complaint was filed had been based, in part, on § 1338(a), the case would no longer be one arising under the patent laws for purposes of Federal Circuit review when the district court's judgment was entered. Conversely, if an original complaint alleging only an antitrust violation should be amended after discovery to add a patent-law claim, and if the plaintiff should be successful in proving that its patent was valid and infringed but unsuccessful in proving any basis for recovery under the antitrust laws, the district court's judgment would sustain a claim arising under the patent laws even though the complaint initially invoking its jurisdiction had not mentioned it, and an appeal would properly lie in the Federal Circuit.

Whether the complaint is actually amended, as in the previous example, or constructively amended to conform to the proof, see Fed. Rule Civ. Proc. 15(b),[3] Congress' goal of ensuring that appeals of patent-law claims go to the Federal Circuit would be thwarted by determining that court's appellate jurisdiction only through an examination of the complaint as initially filed. That approach would enable an unscrupulous plaintiff to manipulate appellate court jurisdiction by the timing of the amendments to its complaint. The Court expressly leaves open the question whether a constructive amendment could provide the foundation for Federal Circuit patent-law jurisdiction, see *ante*, at 814–815,[4] and says nothing on the subject whether actual amendments to the complaint can so suffice. But since respondent has asked us to rule in its favor on the ground that petitioners' complaint added a patent-law claim through constructive amendment, I think we should make it perfectly clear that even though respondent's approach to the jurisdictional question is sound, its application of that approach to this case fails because the claim that was actually litigated did not arise under the patent laws. Nevertheless, since what the Court has written is not inconsistent with this view, I join its opinion.

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[3] "Rule 15. Amended and Supplemental Pleadings.

"(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. . . ."

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[4] "We need not decide under what circumstances, if any, a court of appeals could furnish itself a jurisdictional basis unsupported by the pleadings by deeming the complaint amended in light of the parties' 'express or implied consent' to litigate a claim. Fed. Rule Civ. Proc. 15(b)."

MACKEY ET AL. *v.* LANIER COLLECTION AGENCY & SERVICE, INC.

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 86–1387. Argued April 19, 1988—Decided June 17, 1988

After respondent collection agency obtained money judgments against participants in an "employee welfare benefit plan" covered by the Employee Retirement Income Security Act of 1974 (ERISA), its request to garnish the debtors' plan benefits was granted by a Georgia trial court. The State Court of Appeals reversed, holding that Ga. Code Ann. § 18–4–22.1 (1982), barring the garnishment of "[f]unds or benefits of [an] . . . employee benefit plan or program subject to . . . [ERISA]," exempted plan benefits from garnishment. The Georgia Supreme Court reversed, concluding that § 18–4–22.1 was pre-empted by ERISA and that the plan was therefore subject to garnishment under the general state garnishment law.

Held:

1. Section 18–4–22.1, which singles out ERISA employee welfare benefit plans for different treatment than non-ERISA welfare plans under state garnishment procedures, is pre-empted under § 514(a) of ERISA, which supersedes any state law insofar as it "relate[s] to" ERISA-covered plans. The state statute's express reference to ERISA plans brings it within the federal law's pre-emptive reach. *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85. Moreover, the possibility that § 18–4–22.1 was enacted to help effectuate ERISA's underlying purposes is not enough to save it from pre-emption, since § 514(a) displaces all state laws that fall within its sphere, including those that are consistent with ERISA's substantive requirements. *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724. Pp. 829–830.

2. Congress did not intend to pre-empt state-law garnishment of an ERISA welfare benefit plan, even where the purpose is to collect judgments against plan participants. Pp. 830–840.

(a) Unlike § 18–4–22.1, Georgia's general garnishment statute does not single out or specially mention ERISA plans of any kind. The argument that, because the general statute requires plan trustees such as petitioners to respond to garnishment orders with funds otherwise due beneficiary-debtors, and to incur substantial administrative burdens and costs, the statute consequently "relates to" the plan within the meaning of § 514(a) is refuted by certain other ERISA provisions, and by several aspects of that statute's structure. Although § 502(d) provides that a plan may "sue or be sued" as an entity for specified relief and clearly contemplates the enforcement of money judgments against a plan, and although lawsuits against ERISA plans for run-of-the-mill state-law contract or tort claims are relatively commonplace, ERISA does not provide an enforcement mechanism for collecting judgments won in either type of action. In lieu of such a provision, state-law collection methods, including garnishment, remain undisturbed by ERISA. See Fed. Rule Civ. Proc. 69(a). Section 514(a)'s language does not support petitioners' attempt to distinguish, as permissible, garnishment to collect plan creditors' judgments from, as impermissible, garnishment on behalf of plan participants' judgment creditors. The fact that § 206(d)(1)'s ban on alienation or assignment is limited to *pension* benefits also supports the conclusion that Congress did not intend to preclude garnishment of *welfare* plan benefits. Section 514(a) cannot be read to protect only benefits, but not plans, from garnishment, since § 206(d)(1) demonstrates Congress' ability to distinguish between benefits and plans when it wished, and since such a construction would render § 206(d)(1) substantially redundant with § 514(a) and therefore superfluous. Pp. 831–838.

(b) Petitioners' and the United States' contention that the Retirement Equity Act of 1984—which specified that § 514(a)'s pre-emption provision does not apply to "qualified domestic relations orders"—establishes that § 514(a), as originally enacted, pre-empts state attachment and garnishment procedures on the theory that, otherwise, an amendment to save such orders would have been unnecessary, is not persuasive. An equally plausible explanation for the amendment is that Congress meant to clarify the original meaning of § 514(a) by correcting court decisions that had erroneously construed the section as pre-empting such orders. Even if petitioners' contention is correct, the opinion of a later Congress as to the meaning of a law enacted 10 years earlier does not control the issue. Rather, ERISA's language and structure demonstrate the intent of the Congress that originally enacted § 514(a) not to pre-empt state garnishment procedures. Pp. 838–840.

256 Ga. 499, 350 S. E. 2d 439, affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, and STEVENS, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which BLACKMUN, O'CONNOR, and SCALIA, JJ., joined, *post*, p. 841.

Ernest L. Mathews, Jr., argued the cause for petitioners. With him on the briefs were *Thomas W. Gleason, Charles R. Goldburg*, and *Kevin Marrinan*.

Brian J. Martin argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried, Deputy Solicitor General Ayer, Christopher J. Wright, George R. Salem, Allen H. Feldman,* and *Carol A. De Deo.*

Maureen E. Mahoney, by invitation of the Court, 484 U. S. 809, argued the cause and filed a brief as *amicus curiae* in support of the judgment below.*

JUSTICE WHITE delivered the opinion of the Court.

The issue here is whether and to what extent the Georgia statutes bearing on the garnishment of funds due to participants in ERISA employee welfare benefit plans are preempted by the federal statute which governs such plans.

I

Petitioners are the trustees of an employee benefit plan that provides vacation and holiday benefits to eligible employees in several southeastern States. The covered workers draw their vacation benefits from the plan annually. The plan is an "employee welfare benefit plan" as defined by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1002(1).[1]

Respondent is a collection agency. It sought and obtained money judgments against 23 plan participants who owed money to clients of respondent. To collect these money judg-

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Benna Ruth Solomon and *Eric B. Amstutz* filed a brief for the National Conference of State Legislatures et al. as *amici curiae* urging reversal.

John K. Van de Kamp, Attorney General of California, *Edmond B. Mamer,* Supervising Deputy Attorney General, and *Raymond B. Jue,* Deputy Attorney General, filed a brief for the State of California as *amicus curiae.*

[1] As defined in 29 U. S. C. § 1002(3), employee benefit plans are of two types: Welfare benefit plans provide health, legal, vacation, or training benefits. § 1002(1). Pension benefit plans provide retirement income. § 1002(2). The plan involved here is a welfare benefit plan.

ments, respondent instituted an action in a Georgia trial court seeking to garnish the debtors' plan benefits. The trial court granted the garnishment request. App. to Pet. for Cert. A-21. The Georgia Court of Appeals reversed, holding that a Georgia statute, Ga. Code Ann. § 18-4-22.1 (1982),[2] barring the garnishment of "[f]unds or benefits of [an] . . . employee benefit plan or program subject to . . . [ERISA]," exempted plan benefits from garnishment. 178 Ga. App. 467, 470, 343 S. E. 2d 492, 495 (1986).

The Georgia Supreme Court reversed. 256 Ga. 499, 350 S. E. 2d 439 (1986). It agreed that § 18-4-22.1 by its terms barred this garnishment action, but concluded that the section was pre-empted by ERISA "since it purports to regulate garnishment of ERISA funds and benefits, a matter specifically provided for" in the federal scheme. *Id.*, at 501, 350 S. E. 2d, at 442. Through an analysis of ERISA's pre-emption provisions, the Georgia Supreme Court concluded that Congress had not barred garnishment of employee *welfare* benefits, even though employee *pension* benefits were so protected. See 29 U. S. C. § 1056(d) (1982 ed. and Supp. IV). Since § 18-4-22.1 "prohibits that which the federal statute permits," the Georgia Supreme Court held, the state law was "in conflict with" the federal scheme, and therefore pre-empted by it. 256 Ga., at 501, 350 S. E. 2d, at 442. Consequently, the plan was subject to garnishment under the general state garnishment law, Ga. Code Ann. § 18-4-20 *et seq.* (1982 and Supp. 1987).

Because of conflicting decisions among the courts on the questions presented here, we granted certiorari. 483 U. S.

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[2] The Georgia law at issue here provides, in relevant part:

"Funds or benefits of a pension, retirement, or employee benefit plan or program subject to the provisions of the federal Employee Retirement Income Security Act of 1974, as amended, shall not be subject to the process of garnishment . . . unless such garnishment is based upon a judgment for alimony or for child support . . . ." Ga. Code Ann. § 18-4-22.1 (1982)

1004 (1987). We now affirm the Georgia Supreme Court's judgment.[3]

II

ERISA § 514(a) pre-empts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the statute. 29 U. S. C. § 1144(a). We believe that under our precedents, Ga. Code Ann. § 18–4–22.1 is such a state law.

The Georgia statute at issue here expressly refers to—indeed, solely applies to—ERISA employee benefit plans. See n. 2, *supra*. "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with *or reference to* such a plan." *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 96–97 (1983) (emphasis added). On several occasions since our decision in *Shaw*, we have reaffirmed this rule, concluding that state laws which make "reference to" ERISA plans are laws that "relate to" those plans within the meaning of § 514(a). See, *e. g., Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 47–48 (1987); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 739 (1985). In fact, we have virtually taken it for granted that state laws which are "specifically designed to affect employee benefit plans" are pre-empted under § 514(a). Cf. *Pilot Life Ins. Co.* v. *Dedeaux, supra*, at 47–48; *Shaw* v. *Delta Air Lines, Inc., supra*, at 98.

The possibility that § 18–4–22.1 was enacted by the Georgia Legislature to help effectuate ERISA's underlying purposes—the view of the Georgia Court of Appeals below, see 178 Ga. App., at 467, 343 S. E. 2d, at 493—is not enough to save the state law from pre-emption. "The pre-emption provision [of § 514(a)] . . . displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." *Metropolitan*

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[3] Respondent elected not to appear in this Court, and we appointed an *amicus curiae* to defend the judgment below. 484 U. S. 809 (1987).

Life Ins. Co. v. *Massachusetts, supra,* at 739. The decision in *Shaw* particularly underscores this point. There, we found a New York antidiscrimination statute pre-empted under § 514(a), even though Congress had not expressed any intent in ERISA to approve of the employment practices that the State had banned by its statute. *Shaw, supra,* at 97, n. 15, 98–99. Legislative "good intentions" do not save a state law within the broad pre-emptive scope of § 514(a).

Consequently, adhering to our precedents in this area, we hold that Ga. Code Ann. § 18–4–22.1, which singles out ERISA employee welfare benefit plans for different treatment under state garnishment procedures,[4] is pre-empted under § 514(a). The state statute's express reference to ERISA plans suffices to bring it within the federal law's pre-emptive reach.

III

A more complex question is posed by the argument of petitioners, rejected by the Georgia Supreme Court, that the entire Georgia garnishment procedure is pre-empted by ERISA. We reserved decision on the issue in *Franchise Tax Board of California* v. *Construction Laborers Vacation Trust for Southern California,* 463 U. S. 1, 7, 26, n. 30 (1983); the question, which is one of federal law,[5] is a close one. We believe, however, that petitioners' contention misapprehends ERISA's pre-emptive scope.

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[4] This "different treatment" is illustrated, not only by the express reference to ERISA plans in the language of § 18–4–22.1, but also in the disparate treatment accorded to non-ERISA benefit plans under Georgia law. Under the State's garnishment statutes, non-ERISA pension and retirement plans are exempted from garnishment, but no exemption is provided for non-ERISA employee welfare benefit plans. Compare Ga. Code Ann. § 18–4–22 (Supp. 1987) with Ga. Code Ann. § 18–4–22.1 (1982). Consequently, ERISA welfare benefit plans are protected from garnishment under Georgia law, but non-ERISA plans are not so protected.

[5] All of the litigants who argued before this Court agreed that federal law controls the resolution of this question. See Brief for Petitioners 11–13; Brief for United States as *Amicus Curiae* 16–17 (filed Aug. 27, 1987); Brief of *Amicus Curiae* in Support of Judgment Below 9.

A

Unlike the Georgia antigarnishment provision discussed above, Georgia's general garnishment statute does not single out or specially mention ERISA plans of any kind. But as we have recognized, the pre-emptive force of § 514(a) is not limited to such state laws. See, *e. g.*, *Pilot Life Ins. Co.* v. *Dedeaux*, *supra*, at 47–48, and *Shaw* v. *Delta Air Lines, Inc.*, *supra*, at 98. Consequently, we must decide whether § 514(a) pre-empts Georgia's general garnishment law because it "relates to" the ERISA welfare benefit plans that petitioners direct.

In arguing for pre-emption, petitioners assert that when an employee welfare benefit plan is garnisheed under Georgia law by a creditor of a participant, plan trustees are served with a garnishment summons, become parties to a suit, and must respond and deposit the demanded funds due the beneficiary-debtor—funds that otherwise they are required to hold and pay out to those beneficiaries. At the very least, petitioners contend, benefit plans subjected to garnishment will incur substantial administrative burdens and costs. Because garnishment will involve and affect the plan and its trustees in these ways, petitioners submit the Georgia garnishment law necessarily "relates to" such ERISA welfare benefit plans and is therefore pre-empted by § 514(a).

Unfortunately, ERISA itself offers no express answer as to whether welfare benefit plan trustees must comply with garnishment orders like those respondent is seeking to enforce. In our view, however, certain ERISA provisions, and several aspects of the statute's structure, indicate that Congress did not intend to forbid the use of state-law mechanisms of executing judgments against ERISA welfare benefit plans, even when those mechanisms prevent plan participants from receiving their benefits. Consequently, we join the virtually unanimous view of federal and state courts which have faced this question, and hold that federal law does not bar a garnishment action like respondent's.[6]

At the outset, we consider the several types of civil suits that can be brought against ERISA welfare benefit plans. First, ERISA's § 502 provides that civil enforcement actions may be brought by particular persons against ERISA plans, to secure specified relief, including the recovery of plan benefits. Suits for benefits or to enforce a participant's rights under a plan may be brought in either federal or state court. 29 U. S. C. § 1132(e). Section 502, which provides that a plan may "sue or be sued" as an entity in § 502 actions, 29 U. S. C. § 1132(d)(1), clearly contemplates the enforcement of money judgments against benefit plans, 29 U. S. C.

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[6] As far as we are aware, the only state or federal court decision in a case involving an employee welfare benefit plan to adopt the United States' view (that § 514(a) pre-empts state-law attachments of welfare benefit plans) was the Ninth Circuit's opinion in *Franchise Tax Board of California* v. *Construction Laborers Vacation Trust for Southern California*, 679 F. 2d 1307 (1982). That decision was subsequently vacated by the Court, 463 U. S. 1 (1983).

Since that action, decisions from the Ninth Circuit have abandoned the position taken by the panel majority in *Franchise Tax Board*, and have adopted the interpretation of § 514(a) that Judge Tang expressed in dissent in that case, 679 F. 2d, at 1310–1311. See, *e. g.*, *Misic* v. *Building Service Employees Health & Welfare Trust*, 789 F. 2d 1374, 1376–1377 (1986); *Arizona Laborers, Teamsters, and Cement Masons, Local 395 Pension Trust Fund* v. *Nevarez*, 661 F. Supp. 365, 368–370 (Ariz. 1987).

Other courts which have faced this question in this context have likewise concluded that ERISA does not pre-empt the application of state garnishment procedures to ERISA welfare benefit plans. See, *e. g.*, *Local Union 212, Int'l Brotherhood of Electrical Workers Vacation Trust Fund* v. *Local 212, Int'l Brotherhood of Electrical Workers Credit Union*, 735 F. 2d 1010, 1011 (CA6 1984) *(per curiam)*, aff'g 549 F. Supp. 1299, 1300–1302 (SD Ohio 1982); *First Nat. Bank of Commerce* v. *Latiker*, 432 So. 2d 293, 296 (La. App. 1983); *Electrical Workers Credit Union* v. *IBEW-NECA Holiday Trust Fund*, 583 S. W. 2d 154, 158–159 (Mo. 1979).

§ 1132(d)(2).[7] See also H. R. Conf. Rep. No. 93–1280, p. 327 (1974).

ERISA plans may be sued in a second type of civil action, as well. These cases—lawsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan—are relatively commonplace.[8] Petitioners and the United States (appearing here as *amicus curiae*) concede that these suits, although obviously affecting and involving ERISA plans and their trustees, are not pre-empted by ERISA § 514(a). See Tr. of Oral Arg. 6, 11–12, 15.

ERISA does not provide an enforcement mechanism for collecting judgments won in either of these two types of actions. Thus, while § 502(d), the "sue and be sued" provision, contemplates execution of judgments won against plans in civil actions, it does not provide mechanisms to do so. Moreover, Federal Rule of Civil Procedure 69(a), which would apply when either type of civil suit discussed above is brought against an ERISA plan in federal court, defers to state law to provide methods for collecting judgments. Cf. also *Huron Holding Corp.* v. *Lincoln Mine Operating Co.*, 312 U. S. 183, 188–194 (1941). Consequently, state-law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA; otherwise, there would be no way to enforce such a judgment won against an ERISA plan. If attachment of ERISA plan funds does not "relate to" an ERISA plan in any of these circumstances, we do not see how respondent's proposed garnishment order would do so.[9]

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[7] The "sue and be sued" clause found in ERISA § 502 provides, in pertinent part:

"(a) . . .

"A civil action may be brought—

"(1) by a participant or beneficiary—

* * * * *

"(B) to recover benefits due to him under the terms of his plan . . . .

* * * * *

"(d) . . .

"(1) An employee benefit plan may sue or be sued under this subchapter as an entity. . . .

"(2) Any money judgment won under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity . . . ." 29 U. S. C. § 1132.

[8] See, *e. g., Morris* v. *Local 804, Delivery & Warehouse Employees Health & Welfare Fund,* 116 Misc. 2d 234, 455 N. Y. S. 2d 517 (N. Y. City Civ. Ct. 1982) (suit against ERISA plan for unpaid rent); *Luxemburg* v. *Hotel & Restaurant Employees & Bartenders Int'l Union Pension Fund,* 91 Misc. 2d 930, 398 N. Y. S. 2d 589 (New York Cty. Ct. 1977) (suit against ERISA plan for unpaid attorneys' fees); *Abofreka* v. *Alston Tobacco Co.,* 288 S. C. 122, 341 S. E. 2d 622 (1986) (tort suit against ERISA plan).

It is thus clear enough that money judgments against ERISA welfare benefit plans, based on state or federal law, won in state or federal court, must be collectible in some way; garnishment is one permissible method. In fact, while petitioners' brief argued that *any* garnishment of an ERISA plan was pre-empted, see Brief for Petitioners 14, under questioning at oral argument, petitioners conceded that garnishment is among the state-law enforcement mechanisms that may used in certain types of cases involving ERISA welfare benefit plans. See Tr. of Oral Arg. 6–7.[10]

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[9] Our conclusion here is further supported by the interpretation we have adopted of "sue and be sued" clauses in previous cases involving other statutes. When Congress provides by law that an entity may "sue and be sued," this includes "all civil process[es] incident to . . . legal proceedings" including "[g]arnishment and attachment." *FHA* v. *Burr*, 309 U. S. 242, 245–246 (1940). We have reaffirmed the view that a "sue and be sued" clause creates a presumption of susceptibility to garnishment and attachment in our more recent cases, as well. See, *e. g.*, *Franchise Tax Board of California* v. *USPS*, 467 U. S. 512, 517–525 (1984). Even petitioners concede that our usual rule is that a "sue and be sued" clause makes a subject entity susceptible to garnishment. See Tr. of Oral Arg. 7.

[10] Following this concession, petitioners later suggested (in a somewhat contradictory argument) that garnishment is not a state procedural device for collecting judgments obtained under some other substantive body of

Nonetheless, petitioners and the United States insist that ERISA § 514(a) bars enforcement of the particular garnishment orders at issue here. The United States rests this claim on its view that § 514(a) prohibits ERISA welfare benefit plans from complying with state-law enforcement orders (like garnishment) *only* where these orders affect "whether benefits will be paid to a plan participant." See Tr. of Oral Arg. 15–16. Under this view of § 514(a), state-law enforcement mechanisms can be used to collect judgments from plan funds when they are won by general creditors of the plan, but not by creditors of plan participants.

The problem with this proposed interpretation of § 514(a) is that it has no basis whatsoever in the language of the statute. Section 514(a) pre-empts State laws "insofar as they . . . relate to . . . employee benefit plan[s]": no distinction is made between plan funds generally and those funds due a particular participant at a particular time. As the *amicus curiae*

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law, but rather, "substantive law . . . [that] creates rights and liabilities where none existed before." See *id.*, at 9.

We note, however, that under Georgia law (at least), garnishment is a "procedural" mechanism for the enforcement of judgments. Georgia's statute that provides for garnishment creates no substantive causes of action, no new bases for relief, or any grounds for recovery; the Georgia garnishment law does not create the rule of decision in any case affixing liability. Rather under Georgia law, postjudgment garnishment is nothing more than a method to collect judgments *otherwise* obtained by prevailing on a claim against the garnishee. See Ga. Code Ann. § 18–4–60 (1982).

This analysis is reinforced by the fact that, under the Georgia statute, a garnishor can obtain a writ of garnishment for the purpose of executing the judgments of either the state *or* federal courts sitting in Georgia, *ibid.*, and by the Georgia Supreme Court's description of postgarnishment actions as "procedural," see, *e. g.*, *Antico* v. *Antico*, 241 Ga. 294, 244 S. E. 2d 820, 821 (1978); *Easterwood* v. *LeBlanc*, 240 Ga. 61, 239 S. E. 2d 383, 383–384 (1977).

Such is the usual understanding of garnishment. For example, garnishment in the federal system is available under the Federal Rule that provides the "*[p]rocess* to enforce a judgment." See Fed. Rule Civ. Proc. 69(a) (emphasis added); see also, *e. g.*, 7 J. Moore, J. Lucas, & K. Sinclair, Moore's Federal Practice ¶ 69.04[3], p. 69–24 (1986).

appointed by this Court put it, "there is simply no logical way to construe the English language so that garnishment or attachment laws 'relate to' benefit plans when they are invoked by creditors of the beneficiaries, but not when they are invoked by beneficiaries or creditors of the [plan] itself." Brief of *Amicus Curiae* in Support of Judgment Below 24. If § 514(a) allows a creditor of a plan to employ state-law procedures to attach plan funds (to collect a judgment it has won against the plan)—if such an action does not "relate to" a benefit plan—we do not see how § 514(a) bars a participant's creditor from employing the same state-law mechanisms.

Where Congress intended in ERISA to preclude a particular method of state-law enforcement of judgments, or extend anti-alienation protection to a particular type of ERISA plan, it did so expressly in the statute. Specifically, ERISA § 206(d)(1) bars (with certain enumerated exceptions) the alienation or assignment of benefits provided for by ERISA *pension* benefit plans. 29 U. S. C. § 1056(d)(1). Congress did not enact any similar provision applicable to ERISA *welfare* benefit plans, such as the one at issue in this case. Section 206(d)(1) is doubly instructive.

First, § 206(d)(1) expressly includes a distinction that the United States would have us read into § 514(a). Section 206(d)(1) bars the assignment or alienation of pension plan *benefits*, and thus prohibits the use of state enforcement mechanisms only insofar as they prevent those benefits from being paid to plan participants. As discussed above, § 514(a), by contrast, deals with state laws as they relate to *plans*. The United States asks us to read § 514(a) as protecting only benefits—but not plans as a whole—from state-law attachment orders (recognizing the numerous problems that would arise if we were to conclude that welfare benefit plans could in no way be subjected to state-law attachment). But by adopting § 206(d)(1), Congress demonstrated that it could, where it wished to, stay the operation of state law as it affects only benefits and not plans. The United States asks us to imply a limitation on a pre-emption provision in one portion of the statute that Congress made express in another portion of ERISA (§ 206(d)(1)). We see no basis for construing the statute in this manner and therefore, in light of § 206(d)(1), reject the United States' suggested interpretation of § 514(a).

Section 206(d)(1) also supports our conclusion in another way. If we were to give ERISA § 514(a) the meaning which petitioners and the United States attribute to it—barring garnishment of all ERISA plan benefits—we would render § 206(d)(1) substantially redundant with § 514(a), as they concede. See Tr. of Oral Arg. 8–9, 14. As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.[11]

Ultimately, in examining §§ 206(d)(1) and 514(a) there is no ignoring the fact that, when Congress was adopting ERISA, it had before it a provision to bar the alienation or garnishment of ERISA plan benefits, and chose to impose that limitation only with respect to ERISA pension benefit plans, and *not* ERISA welfare benefit plans. In a comprehensive regulatory scheme like ERISA, such omissions are significant ones. Cf. *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U. S. 134, 147 (1985). Once Congress was sufficiently aware of the prospect that ERISA plan benefits could be attached and/or garnisheed—as evidenced by its adoption of § 206(d)(1)—Congress' decision to remain silent concerning the attachment or garnishment of ERISA welfare plan benefits "acknowledged and accepted the practice, rather than prohibiting it." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451

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[11] See, *e. g.*, *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U. S. 134, 142 (1985); *FEC* v. *National Conservative Political Action Committee*, 470 U. S. 480, 486 (1985); *Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.*, 469 U. S. 189, 197 (1985); *United States* v. *Generix Drug Corp.*, 460 U. S. 453, 458–459 (1983); *Dickerson* v. *New Banner Institute*, 460 U. S. 103, 118 (1983).

U. S. 504, 516 (1981). We therefore conclude that Congress did not intend to preclude state-law attachment of ERISA welfare plan benefits.[12]

B

In support of its reading of § 514(a), the United States relies heavily on a 1984 amendment to ERISA, the Retirement Equity Act of 1984, Pub. L. 98–397, 98 Stat. 1426. The 1984 Act included several changes in ERISA which Congress felt were necessary to guarantee that the Nation's private retirement-income system provided fair treatment for women. See S. Rep. No. 98–575, p. 1 (1984); H. R. Rep. No. 98–655, p. 1 (1984). Among the Act's provisions were amendments to ERISA which insured that the statute's antigarnishment and pre-emption provisions could not be used to block the enforcement of "qualified domestic relations orders"—generally, court orders providing for child support and alimony payments by ERISA plan participants. See 29 U. S. C. § 1056(d)(3) (1982 ed., Supp. IV); 29 U. S. C. § 1144(b)(7) (1982 ed., Supp. IV). While the primary focus of this portion of the 1984 Act was removing § 206(d)(1)'s antigarnishment protection from pension plan benefits when spouses sought enforcement of domestic support orders, Congress at the same time also amended § 514(a)'s pre-emption provision. It apparently adopted the latter amendments in response to lower court rulings that had interpreted § 514(a) to bar state-law garnishment for the purpose of enforcing domestic relations orders.[13]

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[12] It is not incongruous to find that Ga. Code Ann. § 18–4–20 (Supp. 1987), which provides for garnishment of ERISA welfare benefit plans, escapes pre-emption under ERISA, while striking down § 18–4–22.1—an exception to the general state-law provision—as pre-empted. While we believe that state-law garnishment procedures are not pre-empted by § 514 (a), we also conclude that *any* state law which singles out ERISA plans, by express reference, for special treatment is pre-empted. See Part II, *supra*. It is this "singling out" that pre-empts the Georgia antigarnishment exception.

[13] "The courts are divided on the question of whether [ERISA's] anti-assignment clause applies to State domestic relations orders and also on

Petitioners and the United States argue that the 1984 amendment to § 514(a) makes clear that the section, as originally enacted, generally pre-empts state attachment and garnishment procedures. Otherwise, they contend, there would have been no necessity to amend § 514(a) to save domestic relation orders from pre-emption. There is, however, another plausible construction of Congress' action in 1984, namely, that Congress thought that some courts had erroneously construed § 514(a) as pre-empting such orders. In this view, the 1984 amendment served the purpose of correcting the error, thus clarifying the original meaning of the section.[14] Cf. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U. S. 568, 585 (1988); *United Airlines, Inc.* v. *McMann*, 434 U. S. 192, 218 (1977) (MARSHALL, J., dissenting.) Moreover, even if the United States is correct, and Congress in 1984 thought that § 514(a) as originally enacted pre-empted domestic relations orders directed at ERISA plans—and other state-law attachments and garnishments as well—the opinion of this later Congress as to the meaning of a law enacted 10 years earlier does not control the issue. *United Airlines, Inc.* v.

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the question of whether the pre-emption clause [§ 514(a)] refers to State domestic relations laws and court orders." H. R. Rep. No. 98–655, pt. 1, p. 30 (1984).

[14] For this reason we think the dissent's suggestion that our reading of § 514(a) renders that provision "redundant" with § 514(b)(7) is unsound. *Post*, at 845–846. Section 514(b)(7) was enacted a decade after § 514(a) was adopted, in response to lower court interpretations of § 514(a) which were not of Congress' liking. Consequently, even if (given the interpretation of § 514(a) which we adopt today) § 514(b)(7) overlaps with § 514(a), our decision does not suffer from the evil of rendering duplicative two statutory provisions simultaneously adopted by Congress.

Unfortunately, the same cannot be said of the dissent's reading of § 206(d)(1) and § 514(a), which does render "redundant" two provisions of ERISA enacted at the same time. It is this sort of redundancy—*i. e.*, the suggestion that Congress intentionally adopted, at a single time, two separate provisions having the same meaning—that calls a particular statutory interpretation into question. See n. 11, *supra*. Even the dissent concedes that this problem plagues its reading of § 514(a). *Post*, at 845.

McMann, supra, at 200, n. 7. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price,* 361 U. S. 304, 313 (1960).[15]

Much the same is to be said about the sentence in the relevant House Committee Report on which the United States relies: "[T]he Committee reasserts that a state tax levy on employee welfare benefit plans is pre-empted by ERISA (see the holding of the 9th Circuit in *Franchise Tax Board . . .*)." H. R. Rep. No. 98–655, pt. 1, *supra,* at 42. This statement does suggest that the House Committee in 1984 thought that § 514(a) foreclosed state-law attachment orders akin to those at issue here. But again, these views—absent an amendment to the original language of the section—do not direct our resolution of this case. Instead, we must look at the language of ERISA and its structure, to determine the intent of the Congress that originally enacted the provision in question. "It is the intent of the Congress that enacted [the section] . . . that controls." *Teamsters* v. *United States,* 431 U. S. 324, 354, n. 39 (1977). This inquiry supports our reading of § 514(a), which is the reading given it by every other court that has considered the issue in this context (save the Ninth Circuit in a decision that was vacated by this Court).

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[15] See also, *e. g., Jefferson County Pharmaceutical Assn.* v. *Abbott Laboratories,* 460 U. S. 150, 165, n. 27 (1983); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.,* 447 U. S. 102, 116–118, and n. 13 (1980); *Oscar Mayer & Co.* v. *Evans,* 441 U. S. 750, 758 (1979).

The dissent claims that we are ignoring, in § 514(b)(7), "a positive expression of legislative will" that forecloses our interpretation of § 514(a). *Post,* at 843. But whatever else one can say about the relevance of § 514 (b)(7) to this case, one cannot say that that statutory provision amounts to a congressional enactment that controls here. Section 514(b)(7) has no direct bearing on this case, because it involves a type of garnishment order not at issue here. The most one can glean from § 514(b)(7) is a sense of what Congress, in 1984, understood the scope of § 514(a) to be—a sense that does not command our obedience here. Moreover, for the reasons we discuss above, we do not even think that it is clear that the 98th Congress actually read § 514(a) in the way that the dissent insists that it did.

IV

Accordingly, we hold that ERISA does not forbid garnishment of an ERISA welfare benefit plan, even where the purpose is to collect judgments against plan participants. Moreover, since we agree with the Georgia Supreme Court that the Georgia antigarnishment provision found in Ga. Code Ann. § 18–4–22.1 (1982) is pre-empted by ERISA, the judgment below is

Affirmed.

JUSTICE KENNEDY, with whom JUSTICE BLACKMUN, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

When it enacted ERISA in 1974, Congress expressly preempted "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan," and broadly defined "state law" to include "all laws, decisions, rules, regulations, or other State action having the effect of law." ERISA § 514(a), 29 U. S. C. § 1144(a). The Court holds that these provisions pre-empt a Georgia statute, Ga. Code Ann. § 18–4–22.1 (1982), specifically exempting ERISA plans from the State's garnishment laws. With this much I agree. The Court also holds, however, that § 514(a), ERISA's preemption provision, does not prohibit the garnishment of funds due to participants in ERISA welfare benefit plans. I believe that this latter conclusion is inconsistent with both the statute and our precedents and, with all respect, I dissent.

I

We have said with repeated emphasis that the reach of § 514(a) is not limited to state laws specifically designed to affect employee benefit plans. See *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 45–46 (1987); *Shaw* v. *Delta Airlines, Inc.*, 463 U. S. 85, 98 (1983). Further, the reach of § 514(a) is not limited to state laws that conflict with the substantive provisions of ERISA. See *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 739 (1985). On the contrary, the phrase "relate to" must be "'given its broad common-sense meaning, such that a state law "relate[s] to" a benefit plan "in the normal sense of the phrase, if it has a connection with or reference to such a plan."''" *Pilot Life Insurance Co.* v. *Dedeaux*, *supra*, at 47, quoting *Metropolitan Life*, *supra*, at 739, in turn quoting *Shaw*, *supra*, at 99. In my view, state garnishment laws necessarily relate to employee benefit plans to the extent they require such plans to act as garnishees, which is a substantial and onerous obligation.

Compliance with the state garnishment procedures subjects the plan to significant administrative burdens and costs. Petitioners are required to confirm the identity of each of the 23 plan participants who owe money to respondent, calculate the participant's maximum entitlement from the fund for the period between the service date and the reply date of the summons of garnishment, determine the amount that each participant owes to respondent, and make payments into state court of the lesser of the amount owed to respondent and the participant's entitlement. Petitioners must also make decisions concerning the validity and priority of garnishments and, if necessary, bear the costs of litigating these issues. Further, as trustees of a multiemployer plan covering participants in several States, petitioners are potentially subject to multiple garnishment orders under varying or conflicting state laws. It is apparent that these effects of garnishment laws on employee benefit plans are not tenuous, remote, or peripheral, and that such laws are accordingly pre-empted. See *Shaw* v. *Delta Airlines, Inc.*, *supra*, at 100, n. 21.

This common-sense reading of the language of § 514(a) is confirmed by Congress' decision to exempt certain "domestic relations orders" from the pre-emptive reach of ERISA. See 29 U. S. C. § 1144(b)(7) (1982 ed., Supp. IV). As the majority acknowledges, this provision was intended to save from pre-emption certain garnishments designed to enforce domestic relations obligations. See *ante*, at 838. The majority disregards, however, the strong structural implication created by the limited scope of this exception. Surely Congress knew that similar questions concerning the validity of garnishment procedures would arise in other contexts. Indeed, the majority recognizes as much. See *ante*, at 840, citing H. R. Rep. No. 98–655, pt. 1, p. 42 (1984). Yet Congress decided to save from pre-emption only a limited class of garnishment orders, and then only upon specifically prescribed conditions. See 29 U. S. C. § 1056(d)(3)(B)(i) (1982 ed., Supp. IV) (defining "qualified domestic relations order"). The majority's conclusion that ERISA does not bar garnishment of welfare plan benefits renders nugatory this carefully calibrated legislative choice.

It is no answer to say, as the majority does, that the "'views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Ante*, at 840, quoting *United States* v. *Price*, 361 U. S. 304, 313 (1960). For the views that the majority rejects are not the postenactment musings of a Member of Congress or congressional committee, but a positive expression of legislative will to which we are bound to give effect. In enacting § 514(b)(7) Congress dispelled any possible doubt concerning the circumstances under which welfare benefit plans are required to comply with state orders providing for the garnishment of plan benefits. The Court, which not infrequently calls upon Congress to manifest its intent more clearly, today disregards a clear answer given by Congress in a valid enactment.

II

In reaching its conclusion that Georgia's garnishment statutes are not pre-empted in the circumstances of this case, the Court relies on two principal arguments. First, the Court notes that Congress contemplated that ERISA benefit plans would be subject to suit under certain circumstances. The majority notes, correctly, that civil enforcement actions are maintainable pursuant to 29 U. S. C. § 1132. The majority points further to certain suits that may be brought "against ERISA plans for run-of-the-mill state-law claims . . . ." *Ante*, at 833. The Court reasons that, as ERISA does not provide an enforcement mechanism for collecting judgments won in such suits, Congress must have intended that state-law methods of collection remain undisturbed.

This argument has no relevance to the issue before us. The question we face is not whether garnishment may be used to enforce a valid judgment obtained against an ERISA plan. When garnishment is so used, its process issues against some third party who owes the plan a debt or who has property in his possession in which the plan has an interest. The significant burdens of complying with the garnishment order fall on the plan's debtor, not on the plan. The issue we face in this case is quite different: it is whether an ERISA benefit plan may be forced to act as a *garnishee* by creditors of the plan's participants and beneficiaries. Because the Court fails to analyze the different contexts in which state garnishment laws may affect ERISA plans, its conclusion that such laws are never pre-empted is far too broad. And while the Court's conclusion may be valid in garnishment proceedings where an ERISA plan is the debtor, it is plainly unwarranted in situations where, as here, the plan is a garnishee. For it is in the latter situation that plans face the repetitious and costly burden of monitoring controversies involving hundreds of beneficiaries and participants in various States.

Further, it assumes the point in issue to say that the Court's conclusion is required by cases holding that a "sue-and-be-sued" clause creates a presumption of susceptibility to garnishment and other state-law procedures for enforcing judgments. See *ante*, at 834, n. 9, citing *Franchise Tax Board of California* v. *USPS*, 467 U. S. 512 (1984), and *FHA* v. *Burr*, 309 U. S. 242 (1940). The "sue-and-be-sued" clause in each of those cases was a waiver of the sovereign immunity that otherwise would have protected certain federal agencies from legal process, including writs of garnishment. In that context, it was perfectly sensible to "presum[e] that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is no less amenable to judicial process than a private enterprise under like circumstances would be." *FHA* v. *Burr, supra,* at 245. In the ERISA context, by contrast, § 514(a) substantively limits the States' ability to treat employee benefit plans as they may treat any commercial enterprise. Our cases finding several state-law causes of action pre-empted establish at least this much. See, *e. g., Pilot Life,* 481 U. S., at 47–48 (holding that certain contract and tort laws, though otherwise generally applicable, may not be invoked against an employee benefit plan); *Shaw,* 463 U. S., at 103–106 (finding certain fair employment laws pre-empted).

The second argument on which the Court relies is that the conclusion that § 514(a) pre-empts the state statutes at issue in this case would render redundant the bar against alienation or assignment of pension benefits set forth in ERISA § 206(d)(1), 29 U. S. C. § 1056(d)(1). See *ante,* at 837. This provision prohibits any assignment, whether voluntary or involuntary, of pension plan assets. Under the view the Court rejects, § 514(a) would prohibit involuntary assignments of pension and welfare plan assets because such assignments necessarily would be effected by application of state laws, like the Georgia laws at issue in this case, that are preempted. I agree with the Court that ordinarily the partial redundancy of a statutory command, such as would result from the interpretation of § 514(a) that the Court rejects, is not lightly to be inferred. Nevertheless, I believe there are two reasons why this consideration is not weighty in the present context.

First, the alternative construction adopted by the Court results in the total redundancy of § 514(b)(7), 29 U. S. C. § 1144(b)(7) (1982 ed., Supp. IV). It is preferable, in my view, to tolerate the partial overlap rejected by the Court than to construe § 514(a) so as to render another section of the statute surplus in its entirety. Second, the deliberate, expansive reach of § 514(a) necessarily encompasses many state laws that would be pre-empted even in the absence of its broad mandate, solely on the basis of their conflict with ERISA's substantive requirements. Some degree of overlap is a necessary concomitant of the approach to pre-emption chosen by Congress. The partial redundancy which the Court strives to avoid is essentially analogous to a host of like overlaps that Congress must have foreseen. To suggest that this type of overlap is sufficient to call into question the applicability of § 514(a) is to defeat the very purpose for which it was enacted. I cannot agree with the Court's conclusion that petitioners must comply with the garnishment orders at issue in this case.

LILJEBERG *v.* HEALTH SERVICES ACQUISITION CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86-957. Argued December 9, 1987—Reargued April 25, 1988—Decided June 17, 1988

In 1977, pursuant to a plan to construct and operate a hospital in Kenner, Louisiana, petitioner formed a corporation (St. Jude) to apply for the necessary state "certificate of need." During the next two years petitioner negotiated with Loyola University over a proposal to purchase as the hospital site a portion of Loyola's Kenner land for several million dollars, coupled with a plan to rezone Loyola's adjoining land to greatly increase its value. Federal District Court Judge Robert Collins was a member, and regularly attended the meetings, of Loyola's Board of Trustees, whose minutes indicated regular discussions of the negotiations' progress and reflected the fact that Loyola's interest in the project was dependent on the issuance of the certificate. Petitioner also conducted negotiations with respondent's corporate predecessor Hospital Affiliates International (HAI), culminating in HAI's purchase of a Kenner site not owned by Loyola and its filing of the certificate application upon petitioner's execution of an agreement which HAI believed gave it title to St. Jude. After the certificate was issued in St. Jude's name, and a dispute between petitioner and HAI arose as to St. Jude's ownership, petitioner's proposal to reopen the Loyola negotiations was discussed and formally approved at the Board's meeting on November 12, 1981, which Judge Collins attended. On November 30, 1981, respondent filed suit in the District Court seeking a declaration of ownership of St. Jude. Judge Collins, sitting without a jury, tried the case on January 21 and 22, 1982, immediately announcing his intention to rule for petitioner. On January 28, 1982, at a meeting which Judge Collins did not attend, the Loyola Board discussed the terms of an agreement of sale with petitioner, which provided, *inter alia*, that it would be void if petitioner failed to satisfy certain conditions, the fulfillment of which depended on his retention of control over the certificate. Judge Collins did not read the minutes of that meeting until March 24, 1982. In the meantime, on March 16, he entered judgment for petitioner, crediting petitioner's version of crucial, disputed conversations. Ten months after the Court of Appeals affirmed that judgment, respondent, having just learned that Judge Collins was associated with Loyola while petitioner and the University were engaged in negotiations concerning the hospital site, moved pursuant to Federal Rule of Civil Procedure 60(b)(6) to vacate the judgment on the ground that Judge Collins was disqualified under 28 U. S. C. § 455(a). Judge Collins denied the motion, but the Court of Appeals reversed and remanded to a different judge, who also denied the motion on the ground that, although the evidence gave rise to an appearance of impropriety, Judge Collins lacked actual knowledge of Loyola's interest in the litigation during the trial and prior to the filing of the judgment. The Court of Appeals again reversed, ruling that the appearance of impropriety is a sufficient ground for disqualification under § 455(a). Moreover, the court ruled that vacatur was an appropriate remedy in these circumstances.

Held:

1. A violation of § 455(a)—which requires a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned—is established when a reasonable person, knowing the relevant facts, would expect that a judge knew of circumstances creating an appearance of partiality, notwithstanding a finding that the judge was not actually conscious of those circumstances. To require scienter as an element of a § 455(a) violation would contravene that section's language and its purpose of promoting public confidence in the integrity of the judicial system. This reading of § 455(a) does not require judges to perform the impossible by disqualifying themselves based on facts they do not know, since, in proper cases, the provision can be applied retroactively to rectify an oversight once the judge concludes that "his impartiality might reasonably be questioned." Here, where both lower courts found an ample basis in the record for concluding that an objective observer would have questioned Judge Collins' impartiality, his failure to disqualify himself was a plain violation of § 455(a) even though it was initially the product of a temporary lapse of memory. Pp. 858–862.

2. Vacatur was a proper remedy for the § 455(a) violation in the circumstances of this case. In determining whether a § 455(a) violation requires vacatur under Rule 60(b)(6)—which gives federal courts broad authority to grant relief from a final judgment "upon such terms as are just," provided that the motion is made within a reasonable time—it is appropriate to consider the risk of injustice to the particular parties, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. Here, despite his lack of actual knowledge of Loyola's interest in the dispute during trial, Judge Collins' participation in the case created a strong appearance of impropriety, particularly in light of his regular attendance at Board meetings, including the one on November 12, 1982, and the fi-

nancial importance of the project to Loyola; his failure to attend the January 28, 1982, meeting or to read the minutes of that meeting before entering judgment; his inexcusable failure to recuse himself or disclose his interest on March 24, 1982, when respondent still had time to file a new-trial motion or to use the failure as an issue on direct appeal; and his failure to acknowledge, in denying the motion to vacate, that he had known about Loyola's interest both shortly before and shortly after trial, or to indicate any awareness of a duty to recuse himself in March 1982. Moreover, vacatur here will not produce injustice in other such cases, and may, in fact, prompt other judges to more carefully search for and disclose disqualification grounds. Furthermore, a careful study of the merits of the underlying litigation suggests that there is a greater risk of unfairness in upholding the judgment for petitioner than in allowing a new trial, while neither petitioner nor Loyola has made a showing of special hardship by reason of their reliance on the original judgment. Finally, although a 10-month delay would normally foreclose vacatur based on a § 455(a) violation, the delay here is excusable since it is entirely attributable to Judge Collins' conduct. Pp. 862–870.

796 F. 2d 796, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and KENNEDY, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which WHITE and SCALIA, JJ., joined, *post*, p. 870. O'CONNOR, J., filed a dissenting opinion, *post*, p. 874.

H. Bartow Farr III reargued the cause for petitioner. With him on the briefs were *A. J. Schmitt, Jr.*, and *Melvin W. Mathes*.

William M. Lucas, Jr., reargued the cause for respondent. With him on the briefs were *Joyce M. Dombourian*, *Curtis R. Boisfontaine*, and *Kathryn J. Lichtenberg*.*

JUSTICE STEVENS delivered the opinion of the Court.

In 1974 Congress amended the Judicial Code "to broaden and clarify the grounds for judicial disqualification." 88 Stat. 1609. The first sentence of the amendment provides:

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*Briefs of *amici curiae* urging affirmance were filed for Kenneth W. Davis, Jr., et al. by *Richard E. Coulson*, *David Kline*, and *Stephen W. Elliott;* and for NEC Corp. et al. by *Shirley M. Hufstedler*.

> "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U. S. C. § 455(a), as amended.

In the present case, the Court of Appeals for the Fifth Circuit concluded that a violation of § 455(a) is established when a reasonable person, knowing the relevant facts, would expect that a justice, judge, or magistrate knew of circumstances creating an appearance of partiality, notwithstanding a finding that the judge was not actually conscious of those circumstances. Moreover, although the judgment in question had become final, the Court of Appeals determined that under the facts of this case, the appropriate remedy was to vacate the court's judgment. We granted certiorari to consider its construction of § 455(a) as well as its remedial decision. 480 U. S. 915 (1987). We now affirm.

I

In November 1981, respondent Health Services Acquisition Corp. brought an action against petitioner John Liljeberg, Jr., seeking a declaration of ownership of a corporation known as St. Jude Hospital of Kenner, Louisiana (St. Jude). The case was tried by Judge Robert Collins, sitting without a jury. Judge Collins found for Liljeberg and, over a strong dissent, the Court of Appeals affirmed. Approximately 10 months later, respondent learned that Judge Collins had been a member of the Board of Trustees of Loyola University while Liljeberg was negotiating with Loyola to purchase a parcel of land on which to construct a hospital. The success and benefit to Loyola of these negotiations turned, in large part, on Liljeberg prevailing in the litigation before Judge Collins.

Based on this information, respondent moved pursuant to Federal Rule of Civil Procedure 60(b)(6) to vacate the judgment on the ground that Judge Collins was disqualified under § 455(a) at the time he heard the action and entered judgment in favor of Liljeberg. Judge Collins denied the motion and respondent appealed. The Court of Appeals determined that resolution of the motion required factual findings concerning the extent and timing of Judge Collins' knowledge of Loyola's interest in the declaratory relief litigation. Accordingly, the panel reversed and remanded the matter to a different judge for such findings. App. to Pet. for Cert. 40a. On remand, the District Court found that based on his attendance at Board meetings Judge Collins had actual knowledge of Loyola's interest in St. Jude in 1980 and 1981. The court further concluded, however, that Judge Collins had forgotten about Loyola's interest by the time the declaratory judgment suit came to trial in January 1982. On March 24, 1982, Judge Collins reviewed materials sent to him by the Board to prepare for an upcoming meeting. At that time—just a few days after he had filed his opinion finding for Liljeberg and still within the 10-day period allowed for filing a motion for a new trial—Judge Collins once again obtained actual knowledge of Loyola's interest in St. Jude. Finally, the District Court found that although Judge Collins thus lacked actual knowledge during trial and prior to the filing of his opinion, the evidence nonetheless gave rise to an appearance of impropriety. However, reading the Court of Appeals' mandate as limited to the issue of actual knowledge, the District Court concluded that it was compelled to deny respondent's Rule 60(b) motion. App. to Pet. for Cert. 14a.

The Court of Appeals again reversed. The court first noted that Judge Collins should have immediately disqualified himself when his actual knowledge of Loyola's interest was renewed.[1] The court also found that regardless of Judge Collins' actual knowledge, "a reasonable observer would expect that Judge Collins would remember that Loyola had some dealings with Liljeberg and St. Jude and seek to ascertain the nature of these dealings." 796 F. 2d 796, 803 (1986). Such an appearance of impropriety, in the view of the Court of Appeals, was sufficient ground for disqualification under § 455(a). Although recognizing that caution is required in determining whether a judgment should be vacated after becoming final, the court concluded that since the appearance of partiality was convincingly established and since the motion to vacate was filed as promptly as possible, the appropriate remedy was to vacate the declaratory relief judgment. Because the issues presented largely turn on the facts as they give rise to an appearance of impropriety, it is necessary to relate the sequence and substance of these events in some detail.

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[1] Because the court concluded that the judgment should be vacated based on an appearance of impropriety that permeated the entire proceeding, it declined to decide on the appropriate remedy for a judge's failure to promptly disqualify himself after the entry of judgment but prior to expiration of the time allowed for filing certain motions.

II

Petitioner, John Liljeberg, Jr., is a pharmacist, a promoter, and a half-owner of Axel Realty, Inc., a real estate brokerage firm. In 1976, he became interested in a project to construct and operate a hospital in Kenner, Louisiana, a suburb of New Orleans. In addition to providing the community with needed health care facilities, he hoped to obtain a real estate commission for Axel Realty and the exclusive right to provide pharmaceutical services at the new hospital. The successful operation of such a hospital depended upon the acquisition of a "certificate of need" from the State of Louisiana; without such a certificate the hospital would not qualify for health care reimbursement payments under the federal medicare and medicaid programs.[2] Accordingly, in October 1979, Liljeberg formed St. Jude, intending to have the corporation apply for the certificate of need at an appropriate time.

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[2] See 42 U. S. C. § 1320a–1 (1982 ed. and Supp. IV). As the Court of Appeals noted, "[w]ithout reimbursement, it is impractical (if not impossible) to operate a hospital." App. to Pet. for Cert. 58a, n. 1.

During the next two years Liljeberg engaged in serious negotiations with at least two major parties. One set of negotiations involved a proposal to purchase a large tract of land from Loyola University for use as a hospital site, coupled with a plan to rezone adjoining University property. The proposed benefits to the University included not only the proceeds of the real estate sale itself, amounting to several million dollars, but also a substantial increase in the value to the University of the rezoned adjoining property. The progress of these negotiations was regularly reported to the University's Board of Trustees by its Real Estate Committee and discussed at Board meetings. The minutes of those meetings indicate that the University's interest in the project was dependent on the issuance of the certificate of need.[3]

Liljeberg was also conducting serious negotiations with respondent's corporate predecessor, Hospital Affiliates International (HAI), a national health management company. In the summer of 1980, Liljeberg and HAI reached an agreement in principle, outlining their respective roles in developing the hospital. The agreement contemplated that HAI would purchase a tract of land in Kenner (not owned by the University) and construct the hospital on that land; prepare and file the certificate of need; and retain Liljeberg as a consultant to the hospital in various capacities. In turn, it was understood that Liljeberg would transfer St. Jude to HAI. Pursuant to this preliminary agreement, various documents were executed, including an agreement by HAI to purchase the tract of land from its owner for $5 million and a further agreement by HAI to place $500,000 in escrow. In addition, it was agreed that Axel Realty, Inc., would receive a $250,000 commission for locating the property. Eventually, Liljeberg signed a "warranty and indemnity agreement," which HAI understood to transfer ownership of St. Jude to HAI. After the warranty and indemnity agreement was signed, HAI filed an application for the certificate of need.

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[3] The District Court found:

"Discussions of the St. Jude Hospital project are reflected in the minutes of the next meeting of the Board of Trustees on January 24, 1980, which Judge Collins attended. See Plaintiff's Exhibit 22. Liljeberg's first offer on behalf of St. Jude Properties to purchase approximately 75 acres of Loyola's Kenner property was presented in a Real Estate Committee report, which was summarized in the Board minutes. The minutes also include the response of Loyola University to Liljeberg, including the Committee's expression of interest in continuing negotiations with St. Jude Properties. The minutes further reflect the Real Estate Committee's communication to Liljeberg that 'until a certificate of need were forthcoming, Loyola would more than likely not be interested in the project.' The minutes outline the terms of a second offer received by Loyola University from St. Jude Properties raising the purchase price by $7,000.00 per acre, 'with no financing necessary and no commitments of any kind except the dedication of 110 feet for roadway purposes, with the improvement cost paid totally by the Liljeberg group.' The minutes elaborate on the details of the offer, including St. Jude Properties' desire for a sixty day period to secure financing to finalize the sale." App. to Pet. for Cert. 19a–20a.

On August 26, 1981, the certificate of need was issued and delivered to Liljeberg. He promptly advised HAI,[4] and HAI paid the real estate commission to Axel Realty. A dispute arose, however, over whether the warranty and indemnity agreement did in fact transfer ownership of St. Jude to HAI. Liljeberg contended that the transfer of ownership of St. Jude—and hence, the certificate of need—was conditioned upon reaching a final agreement concerning his continued participation in the hospital project. This contention was not supported by any written instrument. HAI denied that there was any such unwritten understanding and insisted that, by virtue of the warranty and indemnity agreement, it had been sole owner of St. Jude for over a year. The dispute gave rise to this litigation.

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[4] Coincidentally, HAI was acquired by Hospital Corporation of America on August 26, 1981, through a merger of HAI and respondent, Health Services Acquisition Corporation, which is a subsidiary of Hospital Corporation of America. For convenience, we shall continue to describe this entity as HAI.

Respondent filed its complaint for declaratory judgment on November 30, 1981. The case was tried by Judge Collins, sitting without a jury, on January 21 and 22, 1982. At the close of the evidence, he announced his intended ruling, and on March 16, 1982, he filed a judgment (dated March 12, 1982) and his findings of fact and conclusions of law. He credited Liljeberg's version of oral conversations that were disputed and of critical importance in his ruling.[5]

During the period between November 30, 1981, and March 16, 1982, Judge Collins was a trustee of Loyola University, but was not conscious of the fact that the University and Liljeberg were then engaged in serious negotiations concerning the Kenner hospital project, or of the further fact that the success of those negotiations depended upon his conclusion that Liljeberg controlled the certificate of need. To determine whether Judge Collins' impartiality in the Liljeberg litigation "might reasonably be questioned," it is appropriate to consider the state of his knowledge immediately before the lawsuit was filed, what happened while the case was pending before him, and what he did when he learned of the University's interest in the litigation.

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[5] For example, Liljeberg's attorney testified that before returning the signed copy of the warranty and indemnity agreement to HAI, he told HAI's associate corporate counsel that Liljeberg would not transfer ownership of St. Jude until they reached a binding agreement concerning Liljeberg's continued participation in the hospital project. HAI's associate corporate counsel testified that no such conversation occurred. App. to Pet. for Cert. 61a, n. 3.

Although noting this conflicting testimony, the Fifth Circuit held on appeal that Judge Collins did not abuse his discretion in awarding the certificate to Liljeberg. Judge Rubin, in dissent, pointed to another example of where Liljeberg received the benefit of the doubt on a critical disputed fact. Liljeberg's attorney received the proposed warranty and indemnity agreement from HAI under cover of a letter which stated: "I believe this is the only document . . . that would be needed in effecting the transfer." *Id.*, at 60a, n. 2. Liljeberg's attorney testified, however, that he did not read the letter of transmittal. Yet, as Judge Rubin observed:

"It is curious that a lawyer would fail to read a letter that comes to him attached to an important document. It is curiouser, as Alice said, after she had passed through the looking glass into Wonderland, that Liljeberg, who repeatedly testified that he distrusted HAI although he had contemplated entering into a complex and potentially lucrative relationship with the corporation, designed to operate over a seven-year period, did not respond to the cover letter. . . .

"It is curiouser still that [Liljeberg's attorney], who testified that he did not read the cover letter, nevertheless knew that HAI believed that the Warranty and Indemnity Agreement was sufficient to transfer 'ownership.'" *Id.*, at 75a, n. 4.

After the certificate of need was issued, and Liljeberg and HAI became embroiled in their dispute, Liljeberg reopened his negotiations with the University. On October 29, 1981, the Real Estate Committee sent a written report to each of the trustees, including Judge Collins, advising them of "a significant change" concerning the proposed hospital in Kenner and stating specifically that Loyola's property had "again become a prime location." App. 72. The Committee submitted a draft of a resolution authorizing a University vice president "to continue negotiations with the developers of the St. Jude Hospital." *Id.*, at 73. At the Board meeting on November 12, 1981, which Judge Collins attended, the trustees discussed the connection between the rezoning of Loyola's land in Kenner and the St. Jude project and adopted the Real Estate Committee's proposed resolution. Thus, Judge Collins had actual knowledge of the University's potential interest in the St. Jude hospital project in Kenner just a few days before the complaint was filed.

While the case was pending before Judge Collins, the University agreed to sell 80 acres of its land in Kenner to Liljeberg for $6,694,000. The progress of negotiations was discussed at a Board meeting on January 28, 1982. Judge Collins did not attend that meeting, but the Real Estate Committee advised the trustees that "the federal courts have determined that the certificate of need will be awarded to the St. Jude Corporation." *Id.*, at 37. Presumably this advice was based on Judge Collins' comment at the close of the hearing a week earlier, when he announced his intended ruling because he thought "it would be unfair to keep the parties in doubt as to how I feel about the case." App. to Pet. for Cert. 41a.

The formal agreement between Liljeberg and the University was apparently executed on March 19. App. 50–58. The agreement stated that it was not in any way conditioned on Liljeberg's prevailing in the litigation "pending in the U. S. District Court for the Eastern District of Louisiana . . . involving the obtaining by [Liljeberg] of a Certificate of Need," *id.*, at 55, but it also gave the University the right to repurchase the property for the contract price if Liljeberg had not executed a satisfactory construction contract within one year and further provided for nullification of the contract in the event the rezoning of the University's adjoining land was not accomplished. Thus, the University continued to have an active interest in the outcome of the litigation because it was unlikely that Liljeberg could build the hospital if he lost control of the certificate of need; moreover, the rezoning was in turn dependent on the hospital project.[6]

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[6] As the Court of Appeals pointed out:

"The district court's determination that Loyola's interest in the litigation terminated as of March 19, 1982 is clearly erroneous. Although the agreement between Loyola and Liljeberg was not contingent on the outcome of the lawsuit, as a practical matter Loyola still had a substantial interest in Liljeberg's obtaining the certificate of approval. Without the certificate, it is very likely that Liljeberg would not have been able to build the hospital on the Monroe Tract. The construction of a hospital on its property was extremely important to Loyola as shown by the fact that Loyola was allowed under its agreement with Liljeberg to repurchase the land if a hospital was not built. Furthermore, the construction of a hospital on the Monroe Tract was critical to the effort to rezone the surrounding property owned by Loyola; the rezoning was also of vital interest to Loyola. Therefore, Loyola's interest in the litigation did not terminate as of March 19, 1982 and Judge Collins should have recused himself when he obtained actual knowledge of that interest on March 24." 796 F. 2d 796, 800–801 (1986).

The details of the transaction were discussed in three letters to the trustees dated March 12, 15, and 19, 1982, but Judge Collins did not examine any of those letters until shortly before the Board meeting on March 25, 1982. Thus, he acquired actual knowledge of Loyola's interest in the litigation on March 24, 1982. As the Court of Appeals correctly held, "Judge Collins should have recused himself when he obtained actual knowledge of that interest on March 24." 796 F. 2d, at 801.

In considering whether the Court of Appeals properly vacated the declaratory relief judgment, we are required to address two questions. We must first determine whether § 455(a) can be violated based on an appearance of partiality, even though the judge was not conscious of the circumstances creating the appearance of impropriety, and second, whether relief is available under Rule 60(b) when such a violation is not discovered until after the judgment has become final.

III

Title 28 U. S. C. § 455 provides in relevant part:[7]

> "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

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[7] Prior to the 1974 amendments, § 455 simply provided:

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." 28 U. S. C. § 455 (1970 ed.).

The statute was amended in 1974 to clarify and broaden the grounds for judicial disqualification and to conform with the recently adopted ABA Code of Judicial Conduct, Canon 3C (1974). See S. Rep. No. 93–419, p. 1 (1973); H. R. Rep. No. 93–1453, pp. 1–2 (1974). The general language of subsection (a) was designed to promote public confidence in the integrity of the judicial process by replacing the subjective "in his opinion" standard with an objective test. See S. Rep. No. 93–419, at 5; H. R. Rep. No. 93–1453, at 5.

> "(b) He shall also disqualify himself in the following circumstances:
>
> . . . . .
>
> "(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.
>
> . . . . .
>
> "(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household."

Scienter is not an element of a violation of § 455(a). The judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that "his impartiality might reasonably be questioned" by other persons. To read § 455(a) to provide that the judge must know of the disqualifying facts, requires not simply ignoring the language of the provision—which makes no mention of knowledge—but further requires concluding that the language in subsection (b)(4)—which expressly provides that the judge must *know* of his or her interest—is extraneous. A careful reading of the respective subsections makes clear that Congress intended to require knowledge under subsection (b)(4) and not to require knowledge under subsection (a).[8] Moreover, advancement of the purpose of the provision—to promote public confidence in the integrity of the judicial process, see S. Rep. No. 93–419, p. 5 (1973); H. R. Rep. No. 93–1453, p. 5 (1974)—does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew. As Chief Judge Clark of the Court of Appeals explained:

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[8] Petitioner contends that § 455(a) must be construed in light of § 455 (b)(4). He argues that the reference to knowledge in § 455(b)(4) indicates that Congress must have intended that scienter be an element under § 455 (a) as well. Petitioner reasons that § 455(a) is a catchall provision, encompassing all of the specifically enumerated grounds for disqualification under § 455(b), as well as other grounds not specified. Not requiring knowledge under § 455(a), in petitioner's view, would thus render meaningless the

> "The goal of section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible. The judge's forgetfulness, however, is not the sort of objectively ascertainable fact that can avoid the appearance of partiality. *Hall* v. *Small Business Administration*, 695 F. 2d 175, 179 (5th Cir. 1983). Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or

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knowledge requirement under § 455(b)(4). The requirement could always be circumvented by simply moving for disqualification under § 455(a), rather than § 455(b).

Petitioner's argument ignores important differences between subsections (a) and (b)(4). Most importantly, § 455(b)(4) requires disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates an appearance of impropriety. See § 455(d)(4); *In re Cement and Concrete Litigation*, 515 F. Supp. 1076 (Ariz. 1981), mandamus denied, 688 F. 2d 1297 (CA9 1982), aff'd by absence of quorum, *Arizona* v. *United States District Court*, 459 U. S. 1191 (1983). In addition, § 455(e) specifies that a judge may not accept a waiver of any ground for disqualification under § 455(b), but may accept such a waiver under § 455(a) after "a full disclosure on the record of the basis for disqualification." Section 455(b) is therefore a somewhat stricter provision, and thus is not simply redundant with the broader coverage of § 455(a) as petitioner's argument posits.

bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." 796 F. 2d, at 802.

Contrary to petitioner's contentions, this reading of the statute does not call upon judges to perform the impossible—to disqualify themselves based on facts they do not know. If, as petitioner argues, § 455(a) should only be applied prospectively, then requiring disqualification based on facts the judge does not know would of course be absurd; a judge could never be expected to disqualify himself based on some fact he does not know, even though the fact is one that perhaps he should know or one that people might reasonably suspect that he does know. But to the extent the provision can also, in proper cases, be applied retroactively, the judge is not called upon to perform an impossible feat. Rather, he is called upon to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary. If he concludes that "his impartiality might reasonably be questioned," then he should also find that the statute has been violated. This is certainly not an impossible task. No one questions that Judge Collins could have disqualified himself and vacated his judgment when he finally realized that Loyola had an interest in the litigation. The initial appeal was taken from his failure to disqualify himself and vacate the judgment *after* he became aware of the appearance of impropriety, not from his failure to disqualify himself when he first became involved in the litigation and lacked the requisite knowledge.

In this case both the District Court and the Court of Appeals found an ample basis in the record for concluding that an objective observer would have questioned Judge Collins' impartiality. Accordingly, even though his failure to disqualify himself was the product of a temporary lapse of memory, it was nevertheless a plain violation of the terms of the statute.

A conclusion that a statutory violation occurred does not, however, end our inquiry. As in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance.[9] There need not be a draconian remedy for every violation of § 455(a). It would be equally wrong, however, to adopt an absolute prohibition against any relief in cases involving forgetful judges.

IV

Although § 455 defines the circumstances that mandate disqualification of federal judges, it neither prescribes nor prohibits any particular remedy for a violation of that duty. Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation. In considering whether a remedy is appropriate, we do well to bear in mind that in many cases—and this is such an example—the Court of Appeals is in a better position to evaluate the significance of a violation than is this Court. Its judgment as to the proper remedy should thus be afforded our due consideration. A review of the facts demonstrates that the Court of Appeals' determination that a new trial is in order is well supported.

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[9] Large, multidistrict class actions, for example, often present judges with unique difficulties in monitoring any potential interest they may have in the litigation. In such cases, the judge is required to familiarize himself or herself with the named parties and all the members of the class, which in an extreme case may number in the hundreds or even thousands. This already difficult task is compounded by the fact that the precise contours of the class are often not defined until well into the litigation. See *Union Carbide Corp.* v. *U. S. Cutting Service, Inc.*, 782 F. 2d 710, 714 (CA7 1986); *In re Cement and Concrete Antitrust Litigation*, 515 F. Supp., at 1080.

Of course, notwithstanding the size and complexity of the litigation, judges remain under a duty to stay informed of any personal or fiduciary financial interest they may have in cases over which they preside. See 28 U. S. C. § 455(c). The complexity of determining the conflict, however, may have a bearing on the Rule 60(b)(6) extraordinary circumstance analysis.

Section 455 does not, on its own, authorize the reopening of closed litigation. However, as respondent and the Court of Appeals recognized, Federal Rule of Civil Procedure 60(b) provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgment.[10] In particular, Rule 60(b)(6), upon which respondent relies, grants federal courts broad authority to relieve a party from a final judgment "upon such terms as are just," provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5).[11] The Rule does not particularize the factors that justify relief, but we have previously noted that it provides courts with authority "adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice," *Klapprott* v. *United States*, 335 U. S. 601, 614–615 (1949), while also cautioning that it should only be applied in "extraordinary circumstances," *Ackermann* v. *United States*, 340 U. S. 193 (1950). Rule 60(b)(6) relief is accordingly neither categorically available nor categorically unavailable for all § 455(a) violations. We conclude that in determining whether a judgment should be vacated for a violation of § 455 (a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U. S. 133, 136 (1955) (citation omitted).

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[10] Federal Rule of Civil Procedure 60(b) provides in relevant part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

[11] In *Klapprott* v. *United States*, 335 U. S. 601, 613 (1949), we held that a party may "not avail himself of the broad 'any other reason' clause of 60(b)" if his motion is based on grounds specified in clause (1)—"mistake, inadvertence, surprise, or excusable neglect." Rather, "extraordinary circumstances" are required to bring the motion within the "other reason" language and to prevent clause (6) from being used to circumvent the 1-year limitations period that applies to clause (1). This logic, of course, extends beyond clause (1) and suggests that clause (6) and clauses (1) through (5) are mutually exclusive. See 11 C. Wright & A. Miller, Federal Practice and Procedure § 2864 (1973). We conclude that the basis for relief in this case is extraordinary and that the motion was thus proper under clause (6). See *infra*, at 865–867. Of particular importance, this is not a case involving neglect or lack of due diligence by respondent. Any such neglect is rather chargeable to Judge Collins. Had he informed the parties of his association with Loyola and of Loyola's interest in the litigation on March 24, 1982, when his knowledge of the University's interest was renewed, respondent could have raised the issue in a motion for a new trial or on appeal without requiring that the case be reopened. Moreover, even if

Like the Court of Appeals, we accept the District Court's finding that while the case was actually being tried Judge Collins did not have actual knowledge of Loyola's interest in the dispute over the ownership of St. Jude and its precious certificate of need. When a busy federal judge concentrates his or her full attention on a pending case, personal concerns are easily forgotten. The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of

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respondent had taken the unusual step of reviewing the judge's financial disclosure forms—which reveal that he was a member of the Board of Trustees—the conflict would not have been brought to its attention. The conflict arose not simply from the judge's service on the Board of Trustees, but from his service on the Board while the University was involved in its dealings with Liljeberg. This latter fact would not have been made apparent through examination of the disclosure reports and, according to respondent, was not a matter of public record at the time the case was tried and decided.

judges.[12] The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. See S. Rep. No 93–419, at 5; H. R. Rep. No. 93–1453, at 5. Thus, it is critically important in a case of this kind to identify the facts that might reasonably cause an objective observer to question Judge Collins' impartiality. There are at least four such facts.

First, it is remarkable that the judge, who had regularly attended the meetings of the Board of Trustees since 1977, completely forgot about the University's interest in having a hospital constructed on its property in Kenner. The importance of the project to the University is indicated by the fact that the 80-acre parcel, which represented only about 40% of the entire tract owned by the University, was sold for $6,694,000 and that the rezoning would substantially increase the value of the remaining 60%. The "negotiations with the developers of the St. Jude Hospital" were the subject of discussion and formal action by the trustees at a meeting attended by Judge Collins only a few days before the lawsuit was filed. App. 35.

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[12] As we held in *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813 (1986), this concern has constitutional dimensions. In that case we wrote:

"We conclude that Justice Embry's participation in this case violated appellant's due process rights as explicated in *Tumey*, *Murchison*, and *Ward*. We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama '"would offer a possible temptation to the average [judge] . . . [to] lead him not to hold the balance nice, clear and true."' The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice."'" *Id.*, at 825 (citations omitted).

A finding by another judge—faced with the difficult task of passing upon the integrity of a fellow member of the bench—that his or her colleague merely possessed *constructive* knowledge, and not *actual* knowledge, is unlikely to significantly quell the concerns of the skeptic.

Second, it is an unfortunate coincidence that although the judge regularly attended the meetings of the Board of Trustees, he was not present at the January 28, 1982, meeting, a week after the 2-day trial and while the case was still under advisement. The minutes of that meeting record that representatives of the University monitored the progress of the trial, but did not see fit to call to the judge's attention the obvious conflict of interest that resulted from having a University trustee preside over that trial. These minutes were mailed to Judge Collins on March 12, 1982. If the judge had opened that envelope when he received it on March 14 or 15, he would have been under a duty to recuse himself *before* he entered judgment on March 16.[13]

Third, it is remarkable—and quite inexcusable—that Judge Collins failed to recuse himself on March 24, 1982. A full disclosure at that time would have completely removed any basis for questioning the judge's impartiality and would have made it possible for a different judge to decide whether the interests—and appearance—of justice would have been served by a retrial. Another 2-day evidentiary hearing would surely have been less burdensome and less embarrassing than the protracted proceedings that resulted from Judge Collins' nonrecusal and nondisclosure. Moreover, as the

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[13] One of the provisions of the contract between Loyola and Liljeberg is also remarkable. Despite the fact that earlier minutes of the Board make it clear that the University's interest in serious negotiations with Liljeberg was conditioned upon the certificate of need, the contract expressly recites that control of the certificate was the subject of pending litigation and then provides that "this sale shall not be in any way conditioned upon" the outcome of that litigation. App. 55. The University, however, retained the right to repurchase the property if Liljeberg was unable to go forward with the hospital project. If Liljeberg was found not to control the certificate of need, he, at least arguably, would have been precluded from going forward with the hospital. Moreover, if the parties simply wanted to make the transaction unconditional, they could have omitted any reference to the litigation. An objective observer might reasonably question why the parties felt a need to include this clause.

Court of Appeals correctly noted, Judge Collins' failure to disqualify himself on March 24, 1982, also constituted a violation of § 455(b)(4), which disqualifies a judge if he "knows that he, individually or as a fiduciary, . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." This separate violation of § 455 further compels the conclusion that vacatur was an appropriate remedy; by his silence, Judge Collins deprived respondent of a basis for making a timely motion for a new trial and also deprived it of an issue on direct appeal.[14]

Fourth, when respondent filed its motion to vacate, Judge Collins gave three reasons for denying the motion,[15] but still did not acknowledge that he had known about the University's interest both shortly before and shortly after the trial. Nor did he indicate any awareness of a duty to recuse himself in March 1982.

These facts create precisely the kind of appearance of impropriety that § 455(a) was intended to prevent. The violation is neither insubstantial nor excusable. Although Judge Collins did not know of his fiduciary interest in the litigation, he certainly should have known. In fact, his failure to stay informed of this fiduciary interest may well constitute a separate violation of § 455. See § 455(c). Moreover, providing relief in cases such as this will not produce injustice in other cases; to the contrary, the Court of Appeals' willingness to enforce § 455 may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered. It is therefore appropriate to vacate the judgment unless it can be said that respondent did not make a timely request for relief, or that it would otherwise be unfair to deprive the prevailing party of its judgment.

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[14] We note that the Court of Appeals affirmed by a divided panel. The majority opinion relied extensively on the deference due a trial court as to its findings of fact. Although it is now too late to determine what effect this additional argument might have had on the decision, it is certainly within the realm of the possible that the court's decision would have been swayed.

[15] These were his three reasons:

"First, Loyola University was not and is not a party to this litigation, nor was any of its real estate the subject matter of this controversy. Second, Loyola University is a non-profit, educational institution, and any benefits [inuring] to that institution would not benefit any individual personally. Finally, and most significantly, this Judge never served on either the Real Estate or Executive Committees of the Loyola University Board of Trustees. Thus, this Judge had no participation of any kind in negotiating Loyola University's real estate transactions and, in fact, had no knowledge of such transactions." App. to Pet. for Cert. 50a.

If we focus on fairness to the particular litigants, a careful study of Judge Rubin's analysis of the merits of the underlying litigation suggests that there is a greater risk of unfairness in upholding the judgment in favor of Liljeberg than there is in allowing a new judge to take a fresh look at the issues.[16] Moreover, neither Liljeberg nor Loyola Univer-

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[16] In an unpublished opinion a majority of the Court of Appeals concluded that Judge Collins' findings of fact were not clearly erroneous. In dissent, Judge Rubin expressed the opinion that "Liljeberg's chicanery," *id.*, at 78a, gave rise to an estoppel as a matter of law. He wrote:

"Whether Liljeberg consciously intended to mislead HAI we need not decide. His decision to sign and return the agreement knowing that HAI believed it to be sufficient to transfer 'ownership' makes it clear that he was willing to mislead HAI. . . .

"HAI was misled by Liljeberg's silence into doing what it would not otherwise have done: filing the application for a certificate of need. The HAI witnesses all testified that the company never filed an application unless it wholly controlled the filing corporation; Liljeberg testified that he was aware of that policy.[8]" *Id.*, at 76a–77a.

At this point, Judge Rubin inserted the following footnote:

"[8] That HAI was misled is clear from the face of the application. HAI there described St. Jude as a 'wholly-owned subsidiary.' Indeed, the entire 407-page application is devoted to describing HAI, its hospitals, its management experience, and its assets. Liljeberg's name appears only in three letters of intent to file an application for a certificate of need dated sity has made a showing of special hardship by reason of their reliance on the original judgment.[17] Finally, although a delay of 10 months after the affirmance by the Court of Appeals would normally foreclose relief based on a violation of § 455(a), in this case the entire delay is attributable to Judge Collins' inexcusable failure to disqualify himself on March 24, 1982; had he recused himself on March 24, or even disclosed Loyola's interest in the case at that time, the motion could have been made less than 10 days after the entry of judgment. "The guiding consideration is that the administration

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before July, 1980, and on a copy of the Warranty and Indemnity Agreement. HAI also changed the name of St. Jude's registered agent, further demonstrating its belief that it controlled St. Jude." *Id.*, at 77a, n. 8.

Judge Rubin then continued:

"Therefore, Liljeberg's silence at the time he signed the warranty agreement should estop him from claiming that the agreement, read in conjunction with the HAI cover letter and Douglas' letter enclosing corporate documents, did not transfer control of St. Jude to HAI. However, because Liljeberg's deception did not end there, the estoppel need not rest on that alone.

"Liljeberg signed the March 16, 1981 commission agreement which stated that he was to receive $250,000 (plus interest) only if *HAI* received final section 1122 approval. After the certificate of need was issued, Liljeberg requested and received the commission, which, when paid, amounted to $271,000. In relieving Hospital Corporation of America (HCA), HAI's successor, of $271,000, Liljeberg never mentioned his contention that he still 'owned' St. Jude, and that St. Jude, not HAI, had received the certificate. . . .

"HAI relied on Liljeberg's agreement that it owned St. Jude in buying the property on which the hospital was to be built. HCA justifiably relied on Liljeberg's agreement that it owned St. Jude in paying the commission." *Id.*, at 77a–78a.

[17] In fact, Liljeberg's ownership of the certificate of need has never been entirely settled. On January 31, 1983, just two weeks after the Fifth Circuit's judgment affirming Judge Collins on the merits became final, respondent filed suit against St. Jude and various federal and state agencies. The new action alleges that the certificate was improperly issued in the name of St. Jude and that respondent is instead entitled to the certificate. See *Health Services Acquisition Corp.* v. *Gussinger*, Civil Action No. 83–3031 (ED La.). This litigation is still pending.

of justice should reasonably appear to be disinterested as well as be so in fact." *Public Utilities Comm'n of D. C.* v. *Pollak*, 343 U. S. 451, 466–467 (1952) (Frankfurter, J., in chambers). In sum, we conclude that Chief Judge Clark's opinion of the Court of Appeals reflects an eminently sound and wise disposition of this case.

The judgment of the Court of Appeals is accordingly

Affirmed.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE SCALIA join, dissenting.

The Court's decision in this case is long on ethics in the abstract, but short on workable rules of law. The Court first finds that 28 U. S. C. § 455(a) can be used to disqualify a judge on the basis of facts not known to the judge himself. It then broadens the standard for overturning final judgments under Federal Rule of Civil Procedure 60(b). Because these results are at odds with the intended scope of § 455 and Rule 60(b), and are likely to cause considerable mischief when courts attempt to apply them, I dissent.

I

As detailed in the Court's opinion, § 455(a) provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Section 455 was substantially revised by Congress in 1974 to conform with the recently adopted Canon 3C of the American Bar Association's Code of Judicial Conduct (1974). Previously, a federal judge was required to recuse himself when he had a substantial interest in the proceedings, or when "in his opinion" it was improper for him to hear the case.[1] Subsection (a) was drafted

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[1] The predecessor statute, which had been part of the United States Code for 60 years, stated:

"§ 455. Interest of justice or judge.

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has to replace the subjective standard of the old disqualification statute with an objective test. Congress hoped that this objective standard would promote public confidence in the impartiality of the judicial process by instructing a judge, when confronted with circumstances in which his impartiality could reasonably be doubted, to disqualify himself and allow another judge to preside over the case.[2] The amended statute also had the effect of removing the so-called "duty to sit," which had become an accepted gloss on the existing statute.[3]

Subsection (b) of § 455 sets forth more particularized situations in which a judge must disqualify himself. Congress intended the provisions of § 455(b) to remove any doubt about recusal in cases where a judge's interest is too closely connected with the litigation to allow his participation. Subsection (b)(4), for example, disqualifies a jurist if he knows that he, his spouse, or his minor children have a financial interest in the subject matter in controversy. Unlike the more open-ended provision adopted in subsection (a), the language of subsection (b) requires recusal only in specific circumstances, and is phrased in such a way as to suggest a requirement of actual knowledge of the disqualifying circumstances.

The purpose of § 455 is obviously to inform judges of what matters they must consider in deciding whether to recuse themselves in a given case. The Court here holds, as did the

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been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." 28 U. S. C. § 455 (1970 ed.).

[2] See H. R. Rep. No. 93-1453, p. 5 (1974). See also Bloom, Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges, 35 Case W. Res. L. Rev. 662, 670-676 (1985); Comment, Disqualification of Federal Judges for Bias or Prejudice, 46 U. Chi. L. Rev. 236, 238-242 (1978).

[3] While § 455 provides guidance to a judge when he is considering recusing himself, 28 U. S. C. § 144 supplies a litigant with the opportunity to file an affidavit that the judge before whom the matter is pending has a personal bias or prejudice sufficient to mandate disqualification. Respondent filed no affidavit or motion under § 144 in this case.

Court of Appeals below, that a judge must recuse himself under § 455(a) if he *should have known* of the circumstances requiring disqualification, even though in fact he did not know of them. I do not believe this is a tenable construction of subsection (a). A judge considering whether or not to recuse himself is necessarily limited to those facts bearing on the question of which he has knowledge. To hold that disqualification is required by reason of facts which the judge does *not* know, even though he should have known of them, is to posit a conundrum which is not decipherable by ordinary mortals. While the concept of "constructive knowledge" is useful in other areas of the law, I do not think it should be imported into § 455(a).

At the direction of the Court of Appeals, Judge Schwartz of the District Court for the Eastern District of Louisiana made factual findings concerning the extent and timing of Judge Collins' knowledge of Loyola's interest in the underlying lawsuit. See *ante*, at 851. Judge Schwartz determined that Judge Collins had no actual knowledge of Loyola's involvement when he tried the case. Not until March 24, 1982, when he reviewed materials in preparation for a Board meeting, did Judge Collins obtain actual knowledge of the negotiations between petitioners and Loyola.

Despite this factual determination, reached after a public hearing on the subject, the Court nevertheless concludes that "public confidence in the impartiality of the judiciary" compels retroactive disqualification of Judge Collins under § 455(a). This conclusion interprets § 455(a) in a manner which Congress never intended. As the Court of Appeals noted, in drafting § 455(a) Congress was concerned with the "appearance" of impropriety, and to that end changed the previous subjective standard for disqualification to an objective one; no longer was disqualification to be decided on the basis of the opinion of the judge in question, but by the standard of what a reasonable person would think. But the facts and circumstances which this reasonable person would consider must be the facts and circumstances *known* to the judge at the time. In short, as is unquestionably the case with subsection (b), I would adhere to a standard of actual knowledge in § 455(a), and not slide off into the very speculative ground of "constructive" knowledge.

II

The Court then compounds its error by allowing Federal Rule of Civil Procedure 60(b)(6) to be used to set aside a final judgment in this case. Rule 60(b) authorizes a district court, on motion and upon such terms as are just, to relieve a party from a final judgment, order, or proceeding for any "reason justifying relief from the operation of the judgment." However, we have repeatedly instructed that only truly "extraordinary circumstances" will permit a party successfully to invoke the "any other reason" clause of § 60(b). See *Klapprott* v. *United States*, 335 U. S. 601, 613 (1949); see also *Ackermann* v. *United States*, 340 U. S. 193, 199 (1950). This very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved.

For even if one accepts the Court's proposition that § 455(a) permits disqualification on the basis of a judge's constructive knowledge, Rule 60(b)(6) should not be used in this case to apply § 455(a) retroactively to Judge Collins' participation in the lawsuit. In the first place, it is beyond cavil that Judge Collins stood to receive no *personal* financial gain from the transactions involving petitioner, respondent, and Loyola. Judge Collins' only prior tie to the dealings was as a member of Loyola's rather large Board of Trustees and, although Judge Collins was a member of at least two of the Board's subcommittees, he had no connection with the Real Estate subcommittee, the entity responsible for negotiating the sale of the Monroe Tract. In addition, the motion to set aside the judgment was made by respondent almost 10 months after judgment was entered in March 1982; although relief under Rule 60(b)(6) is subject to no absolute time limitation, there can be no serious argument that the time elapsed since the entry of judgment must weigh heavily in considering the motion. Finally, and most important, Judge Schwartz determined that Judge Collins did not have actual knowledge of his conflict of interest during trial and that he made no rulings after he acquired actual knowledge.[4] I thus think it very unlikely that respondent was subjected to substantial injustice by Judge Collins' failure to recuse himself, and believe that the majority's use of Rule 60(b)(6) retroactively to set aside the underlying judgment is therefore unwarranted.

JUSTICE O'CONNOR, dissenting.

For the reasons given by CHIEF JUSTICE REHNQUIST, *ante*, at 871–873, I agree that "constructive knowledge" cannot be the basis for a violation of 28 U. S. C. § 455(a). The question then remains whether respondent is entitled to a new trial because there are other "extraordinary circumstances," apart from the § 455(a) violation found by the Fifth Circuit, that justify "relief from the operation of the judgment." See Fed. Rule Civ. Proc. 60(b)(6); *Ackermann* v. *United States*, 340 U. S. 193, 199 (1950); *Klapprott* v. *United States*, 335 U. S. 601, 613 (1949). Although the Court collects an impressive array of arguments that might support the granting of such relief, I believe the issue should be addressed in the first instance by the courts below. I would therefore remand this case with appropriate instructions.

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[4] The majority's opinion suggests a number of troubling hypothetical situations, only one of which will demonstrate the difficulties inherent in its decision. Suppose Judge Doe sits on a bench trial involving X Corp. and Y Corp. The judge rules for X Corp., and judgment is affirmed on appeal. Ten years later, officials at Y Corp. learn that, unbeknownst to him, Judge Doe owned several shares of stock in X Corp. Even in the face of an independent factual finding that Judge Doe had no knowledge of this ownership, the Court's construction of § 455(a) and Rule 60(b) would permit the final judgment in X Corp.'s favor to be set aside if the "appearance of impartiality" were not deemed wholly satisfied. Such a result will adversely affect the reliance placed on final judgments and will inhibit developments premised on their finality.

IMMIGRATION AND NATURALIZATION SERVICE *v.* PANGILINAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-1992. Argued February 24, 1988—Decided June 17, 1988*

Respondents, 16 Filipino nationals who served with the United States Armed Forces during World War II, seek United States citizenship pursuant to §§ 701 through 705 of the Nationality Act of 1940, as amended in 1942. Under § 702 of the Act, the Commissioner of Immigration and Naturalization was authorized to designate representatives to receive petitions, conduct hearings, and grant naturalization outside the United States. In August 1945, the American Vice Consul in Manila was designated pursuant to § 702 to naturalize aliens. The Philippine Government, however, expressed its concern that a mass migration of newly naturalized veterans would drain the soon-to-be independent country's manpower, and so the naturalization officer's authority was revoked for a 9-month period between October 1945 and August 1946. Respondents would have been eligible for citizenship under the provisions of the 1940 Act if they had filed naturalization applications before the Act expired on December 31, 1946, but did not do so. More than 30 years later, they petitioned for naturalization, claiming that the 9-month absence of a § 702 naturalization officer violated the 1940 Act and deprived them of rights secured by the Fifth Amendment. The naturalization examiner, in all of the cases consolidated here, recommended against naturalization, and the District Courts rejected the naturalization petitions. On respondents' appeals (some of which were consolidated), heard in two cases by different Ninth Circuit panels, the Court of Appeals ultimately held that the revocation of the Vice Consul's naturalization authority violated what it characterized as the 1940 Act's mandatory language, and that the naturalization of respondents was an appropriate equitable remedy.

Held:

1. Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of the limitations imposed by Congress in the exercise of its exclusive constitutional authority over naturaliza-

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*Together with No. 86-2019, *Immigration and Naturalization Service* v. *Manzano*, also on certiorari to the same court.

tion. Since respondents have no current statutory right to citizenship under the expired provisions of the 1940 Act, the Ninth Circuit lacked authority to grant the petitions for naturalization. The reasoning of *INS* v. *Hibi*, 414 U. S. 5—which held that the same official acts as those alleged here did not give rise to an estoppel that prevented the Government from invoking the December 31, 1946, cutoff date in the 1940 Act—suggests the same result as to the "equitable remedy" theory in this case. Even assuming that, in reviewing naturalization petitions, federal courts sit as courts of equity, such courts can no more disregard statutory provisions than can courts of law. Congress has given the power to the federal courts to make someone a citizen as a specific function to be performed in strict compliance with the terms of 8 U. S. C. § 1421(d), which states that a person may be naturalized "in the manner and under the conditions prescribed in this subchapter, and not otherwise." Pp. 882–885.

2. Assuming that respondents can properly invoke the Constitution's protections, and granting that they had statutory entitlements to naturalization, there is no merit to their contention that the revocation of the Vice Consul's naturalization authority deprived them of their rights under the Due Process Clause of the Fifth Amendment and under its equal protection component. Respondents were not entitled to individualized notice of any statutory rights and to the continuous presence of a naturalization officer in the Philippines from October 1945 until July 1946. Moreover, the historical record does not support the contention that the actions at issue here were motivated by any racial animus. Pp. 885–886.

3. There is no merit to the separate arguments of respondents Litonjua and Manzano, including the argument that the Government did not introduce any evidence in their cases concerning the historical events at issue. It is well settled that the burden is on the alien applicant to establish his eligibility for citizenship. Pp. 886–887.

796 F. 2d 1091, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., concurred in the result. KENNEDY, J., took no part in the consideration or decision of the cases.

Robert H. Klonoff argued the cause for petitioner. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Wallace,* and *Marshall Tamor Golding.*

Donald L. Ungar argued the cause for respondents. With him on the brief for respondent Pangilinan et al. were *Robert A. Mautino, Bill Ong Hing,* and *Susan Lydon. Robert A. Mautino* filed briefs for respondents Litonjua and Manzano.

JUSTICE SCALIA delivered the opinion of the Court.

The respondents, 16 Filipino nationals who served with the United States Armed Forces during World War II, claim they are entitled to apply for and receive American citizenship under a special immigration statute that expired over 40 years ago, §§ 701 to 705 of the Nationality Act of 1940, Ch. 876, 54 Stat. 1137, as amended by the Second War Powers Act of 1942, § 1001, Ch. 199, 56 Stat. 182, 8 U. S. C. §§ 1001 to 1005 (1940 ed., Supp. V) (1940 Act). In the decisions below[1] the Ninth Circuit has, for the third time, ordered naturalization under that expired provision. See *Mendoza* v. *United States,* 672 F. 2d 1320 (CA9 1982), rev'd, 464 U. S. 154 (1984); *INS* v. *Hibi,* 475 F. 2d 7 (CA9), rev'd, 414 U. S. 5 (1973). In part because the decision below was in direct conflict with the Second Circuit's decision in *Olegario* v. *United States,* 629 F. 2d 204 (CA2 1980), cert. denied, 450 U. S. 980 (1981), we granted certiorari.

I

A

In March 1942, Congress amended the immigration laws to make American citizenship more readily available to aliens who served honorably in the United States Armed Forces during World War II. As amended at that time, § 701 of the 1940 Nationality Act exempted those aliens from such naturalization requirements as five years of residency in the

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[1] The two cases actually involve three lawsuits: two appeals (both part of No. 86-1992) that were consolidated in the Court of Appeals *(Pangilinan* v. *INS* and *Litonjua* v. *INS)* and a third (*INS* v. *Manzano,* No. 86-2019) that was consolidated by this Court with No. 86-1992.

United States and proficiency in the English language.[2] Section 702 authorized representatives designated by the Commissioner of Immigration and Naturalization to receive petitions, conduct hearings, and grant naturalization outside the United States.[3] And § 705 authorized the Commissioner, with the approval of the Attorney General, to make such rules and regulations as were necessary to carry into effect the provisions of §§701 and 702.[4]

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[2] Section 701 provided in pertinent part:

"[A]ny person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and who, having been lawfully admitted to the United States, including its Territories and possessions, shall have been at the time of his enlistment or induction a resident thereof, may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention, and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; and (4) no fee shall be charged or collected for making, filing, or docketing the petition for naturalization, or for the final hearing thereon, or for the certification of naturalization, if issued: *Provided, however,* That . . . the petition shall be filed no later than [December 31, 1946] . . . ."

[3] Section 702 provided in pertinent part:

"During the present war, any person entitled to naturalization under section [701] of this [Act], who while serving honorably in the military . . . forces of the United States is not within the jurisdiction of any court authorized to naturalize aliens, may be naturalized in accordance with all the applicable provisions of section 701 without appearing before a naturalization court. The petition for naturalization of any petitioner under this section shall be made and sworn to before, and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Commissioner, which designated representative is hereby authorized to receive such petition in behalf of the Service, to conduct hearings thereon, to take testimony concerning any matter touching or in any way affecting the admissibility of any such petitioner for naturalization, to call witnesses, to administer oaths, including the oath of the petitioner and his witnesses to the petition for naturalization and the oath of renunciation and allegiance prescribed by section 335 of this Act, and to grant naturalization, and to issue certificates of citizenship . . . ."

Over the next three years, approximately 7,000 Filipino soldiers were naturalized as American citizens in places outside the Philippine Islands (which were occupied during that entire period by Japan). Most of these were naturalized by courts in this country, but at least 1,000 others were naturalized by immigration officials appointed under § 702, traveling from post to post on rotation throughout England, Iceland, North Africa, and the islands of the Pacific. See *Hibi*, 414 U. S., at 10 (Douglas, J., dissenting). After the Philippines were liberated from Japanese occupation in August 1945, George Ennis, the American Vice Consul in Manila, was designated to naturalize aliens pursuant to the 1940 Act. Almost immediately after that, the Philippine Government began to express its concern that a mass migration of newly naturalized veterans would drain the country of essential manpower, undermining postwar reconstruction efforts in the soon-to-be independent country. Accordingly, on September 13, 1945, the Commissioner recommended to Attorney General Clark that Vice Consul Ennis' naturalization authority be revoked.[5] On October 26, 1945, Ennis was in-

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[4] Section 705 provided in pertinent part:

"The Commissioner, with the approval of the Attorney General, shall prescribe and furnish such forms, and shall make such rules and regulations, as may be necessary to carry into effect the provisions of this Act."

[5] The Commissioner's memorandum to Attorney General Clark read in pertinent part:

"The Philippine Government again has expressed to the Department of State its concern because Filipino members of the armed forces of the United States are being naturalized even though they have always been domiciled in the Philippine Islands. Since the Islands are not embraced within the domain of any naturalization court, naturalization therein may be awarded only by an administrative official designated by me under the authorization of Section 702 of the Nationality Act, 8 U. S. C. § 1002. Mr. George H. Ennis, Vice Consul of the United States at Manila, has been formed of that revocation. For the next nine months no official with § 702 authority to receive and act upon petitions for naturalization was present in the Philippines, the Immigration and Naturalization Service (INS) apparently taking the position that appointment of such an official was authorized but not mandated. Not until August 1946 did the INS designate a new § 702 official for the Philippines, who naturalized approximately 4,000 Filipinos before the December 31, 1946, expiration date of the 1940 Act.

B

Attorney General Clark's revocation of Vice Consul Ennis' naturalization authority during those nine months of 1945 and 1946 has led to a stream of litigation involving efforts by Filipino veterans to obtain naturalization under the expired 1940 Act. In the suits we have before us here, all of the respondents except Mario Valderrama Litonjua and Bonifacio Lorenzana Manzano filed their petitions in the United States District Court for the Northern District of California. The INS has stipulated that all of these 14 respondents (the *Pangilinan* respondents) were eligible for naturalization under the 1940 Act and were present in the Philippines during the period from October 1945 to August 1946, though they had not taken affirmative steps to be naturalized before the cutoff date. The naturalization examiner who handled these cases recommended against naturaliza-

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designated to grant naturalizations under Section 702, but I do not believe he has as yet exercised his authority.

"In view of the concern expressed by the Philippine Government, it is my belief that that situation might best be handled by revoking the authority previously granted to Mr. Ennis and by omitting to designate any representative authorized to confer citizenship in the Philippine Islands. This course would eliminate a source of possible embarrassment in our dealings with the Philippine people, who probably will be awarded independence in the near future." Memorandum to Tom C. Clark, Attorney General, from Ugo Carusi, INS Commissioner, dated September 13, 1945, quoted in *Matter of Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931, 936, n. 5 (ND Cal. 1975).

tion, and the District Court decided against naturalization, relying on the Second Circuit's decision in *Olegario.* The naturalization petitions were consolidated for purposes of appeal to the Ninth Circuit.

Respondent Litonjua's petition for naturalization was filed in the United States District Court for the Southern District of California. Litonjua had served as a member of the United States Navy from May 1941 to April 1946, but had made no effort to apply for naturalization while on active duty. He made preliminary efforts to obtain citizenship while working as a civilian employee of the United States Army in Seattle, Washington, after his discharge, but he did not complete the petition process before the December 31, 1946, cutoff date. The naturalization examiner recommended against naturalization, and the District Court concurred, for reasons similar to those adopted by the District Court in *Pangilinan.*

Respondent Manzano also petitioned for naturalization in the Southern District of California. His situation was the same as that of the *Pangilinan* respondents, except that he claims that in July 1946, after completing his military service, he specifically inquired at the American Embassy in the Philippines about the possibility of obtaining citizenship but was told there was no longer anyone there to assist him. The District Court, following the recommendation of the naturalization examiner, denied the petition for reasons similar to those adopted by the District Courts in *Pangilinan* and *Litonjua.*

The appeals of the *Pangilinan* respondents and Litonjua were filed in 1980 and 1981 and were consolidated by the Court of Appeals (No. 86–1992). Manzano's appeal (No. 86–2019) was filed later and assigned to a different panel. The Ninth Circuit initially decided the *Pangilinan-Litonjua* consolidated cases by relying on the collateral-estoppel theory of its *Mendoza* decision, which had not yet been reversed by this Court. We vacated that judgment in light of our ruling in *Mendoza.* *INS* v. *Litonjua,* 465 U. S. 1001 (1984), vacating and remanding *Barretto* v. *United States,* 694 F. 2d 603 (CA9 1982). On remand, the Ninth Circuit held that the revocation of Vice Consul Ennis' naturalization authority violated what it characterized as the mandatory language of §§702 and 705 of the 1940 Act, and that the naturalization of the respondents was an appropriate equitable remedy. *Pangilinan* v. *INS,* 796 F. 2d 1091 (CA9 1986). After this decision was announced, the panel in No. 86–2019 reversed and remanded to the District Court for reconsideration in light of the *Pangilinan* decision, characterizing the two cases as nearly identical. In 86–1992, the INS' petition for rehearing with suggestion for rehearing en banc was denied, with Judge Kozinski (writing for himself and seven others) dissenting. *Pangilinan* v. *INS,* 809 F. 2d 1449 (CA9 1987). We granted the INS' petition for a writ of certiorari. 484 U. S. 814 (1987).

II

A

Article I, §8, cl. 4, of the Constitution provides: "The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . ." Sections 701, 702, and 705 of the amended 1940 Act, set forth in the margin above, constitute a complete description of the extent of the liberalized naturalization rights conferred under that exclusive constitutional authority in 1942. Section 701 explicitly limits the benefits to those who filed petitions no later than December 31, 1946. Moreover, Congress has again exercised its exclusive constitutional power to provide that any petition for naturalization filed on or after September 26, 1961, will be heard and determined under the 1952 Nationality Act, as amended. See §310(e), 75 Stat. 656, 8 U. S. C. §1421(e). Respondents concede that they are not entitled to be naturalized under that law. Brief for Respondent Pangilinan in Opposition 12–13. Since all the petitions for naturalization in this case were filed after December 31, 1946, and even after September 26, 1961, it is incontestable (and uncontested) that respondents have no statutory right to citizenship.

In *INS* v. *Hibi*, 414 U. S. 5 (1973), we summarily reversed the holding of the Ninth Circuit that the same official acts alleged here gave rise to an estoppel that prevented the Government from invoking the December 31, 1946, cutoff in the 1940 Act. We said that normal estoppel rules applicable to private litigants did not apply to the INS since, "in enforcing the cutoff date established by Congress, as well as in recognizing claims for the benefits conferred by the Act, [the INS] is enforcing the public policy established by Congress." *Id.*, at 8.

Although the Ninth Circuit's holding in the present cases rests upon a somewhat different theory—not that estoppel eliminates the effectiveness of the December 31, 1946, cutoff, but that equitable authority to craft a remedy enables the conferral of citizenship despite that cutoff—we think our reasoning in *Hibi* quite clearly produces the same result. The reason we expressed why estoppel could not be applied, viz., that that doctrine could not override a "public policy established by Congress," surely applies as well to the invocation of equitable remedies. Even assuming the truth of the Ninth Circuit's unsupported assertion that "[i]n reviewing naturalization petitions, federal courts sit as courts of equity," 796 F. 2d, at 1102, it is well established that "[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." *Hedges* v. *Dixon County*, 150 U. S. 182, 192 (1893). "A Court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law . . . ." *Rees* v. *Watertown*, 19 Wall. 107, 122 (1874). See also, *e. g.*, *Thompson* v. *Allen County*, 115 U. S. 550, 555 (1885); 1 J. Story, Equity Jurisprudence § 19 (W. Lyon ed. 1918).

More fundamentally, however, the power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers. See, *e. g.*, 28 U. S. C. § 1361; 28 U. S. C. § 1651. Rather, it has been given them as a specific function to be performed in strict compliance with the terms of an authorizing statute which says that "[a] person may be naturalized . . . in the manner and under the conditions prescribed in this subchapter, *and not otherwise*." 8 U. S. C. § 1421(d) (emphasis added).

> "An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare." *United States* v. *Ginsberg*, 243 U. S. 472, 474 (1917).

Or as we have more recently said: "'Once it has been determined that a person does not qualify for citizenship, . . . the district court has no discretion to ignore the defect and grant citizenship.'" *Fedorenko* v. *United States*, 449 U. S. 490, 517 (1981) (citation omitted).

The congressional command here could not be more manifest. Besides the explicit cutoff date in the 1940 Act, Congress in 1948, adopted a new liberalized citizenship program that excluded Filipino servicemen, and specifically provided that even applications timely filed under the 1940 Act and still pending would be adjudged under the new provisions. Act of June 1, 1948, Ch. 360, 62 Stat. 281. These provisions were carried forward into the 1952 Nationality Act, see 66 Stat. 250, 8 U. S. C. § 1440. (It is particularly absurd to contemplate that Filipinos who actually filed their applications before the 1946 cutoff were denied citizenship by reason of this provision, whereas the present respondents, who filed more than 30 years after the deadline, were awarded it by the Ninth Circuit.) Finally, in 1961, Congress amended the 1952 Act by adding § 310(e), 8 U. S. C. § 1421(e), which specifies that "any" petition thereafter filed will be adjudged under the requirements of the 1952 Act. Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of these limitations.

B

Respondents advance as an alternative ground for affirmance the claim that Attorney General Clark's revocation of Vice Consul Ennis' naturalization authority deprived them of their rights under the Due Process Clause of the Fifth Amendment and under its equal protection component. See *Hampton* v. *Mow Sun Wong,* 426 U. S. 88, 100 (1976). Assuming that these respondents can properly invoke the protections of the United States Constitution, and granting that they are members of a special class that Congress intended to favor with statutory entitlements to naturalization, they were not deprived of those entitlements without due process. First, it did not violate due process for Congress to impose a reasonable limitations period upon the filing of naturalization petitions. Cf. *Logan* v. *Zimmerman Brush Co.,* 455 U. S. 422, 437 (1982). Second, even assuming that a reasonable opportunity to file for naturalization was required, respondents were accorded at least that. Unlike noncitizen servicemen in other parts of the world, they had the continuous presence of a § 702 naturalization officer in the Philippines from August 1945 through October 1945, and from August 1946 to the end of that year. In this last period, the officer naturalized approximately 4,000 Filipinos. In addition, approximately another 7,000 Filipinos were naturalized either in this country or by naturalization officers traveling post to post around the world. We do not agree with respondents' contention that in addition to these ample opportunities, respondents were entitled as a matter of due process to individualized notice of any statutory rights and to the continuous presence of a naturalization officer in the Philippines from October 1945 until July 1946.

We also reject the possibility of a violation of the equal protection component of the Fifth Amendment's Due Process Clause. The approximately 7-month presence of a naturalization officer in the Philippines not only met the applicable standard of equal protection, but indeed compared favorably with the merely periodic presence of such officers elsewhere in the world. See generally *Fiallo* v. *Bell*, 430 U. S. 787, 792 (1977); *Mathews* v. *Diaz*, 426 U. S. 67, 79–83 (1976). Moreover, beyond the absence of any unequal treatment, the historical record lends no support whatever to the contention that the actions at issue here were motivated by any racial animus. Indeed, it is fair to assume that the Filipino soldiers who fought so valiantly during the early months of World War II were regarded with especial esteem when this legislation was enacted and implemented. Every court to consider this matter has observed that Attorney General Clark's and Commissioner Carusi's decisions were taken in response to the concerns of Philippine officials that their nation would suffer a manpower drain, and not because of hostility towards Filipinos. See n. 5, *supra*. Thousands of Filipinos were naturalized outside the Philippines during the period in question, and approximately 4,000 more in the Philippines after a successor to Ennis was appointed in August 1946.

C

Respondents Litonjua and Manzano argue that the Government cannot prevail in their cases even if it prevails with respect to the 14 *Pangilinan* respondents because it did not introduce any evidence in their cases concerning the historical events at issue. This argument fails, since "it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect," *Berenyi* v. *District Director, INS*, 385 U. S. 630, 637 (1967). We also reject respondent Litonjua's assertion that his claim should be treated differently because he is within that category of veterans ("Category I" as described in *Matter of*

Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931, 937–940 (ND Cal. 1975)) whose petitions it has been the policy of the Government not to oppose. That category includes only veterans who had taken some affirmative steps to obtain naturalization both before the December 31, 1946, cutoff date and while they were still on active duty. *Ibid.* Litonjua made his first efforts after he was no longer on active duty with the Armed Forces.

We have considered Litonjua's and Manzano's other separate claims and have found none that is meritorious.

* * *

For the reasons stated, the judgments of the Court of Appeals are reversed.

It is so ordered.

JUSTICE BLACKMUN concurs in the result.

JUSTICE KENNEDY took no part in the consideration or decision of these cases.

BENDIX AUTOLITE CORP. *v.* MIDWESCO ENTERPRISES, INC., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 87-367. Argued March 23, 1988—Decided June 17, 1988

In 1974, appellant, a Delaware corporation with its principal place of business in Ohio, and appellee Midwesco Enterprises (appellee), an Illinois corporation with its principal place of business in Illinois, entered into a contract for appellee's delivery and installation of a boiler system at appellant's Ohio facility. After a contract dispute arose, appellant filed this diversity action in the Northern District of Ohio in 1980. When appellee asserted the Ohio statute of limitations as a defense, appellant responded that the limitations period had not elapsed because under an Ohio statute the running of the time is tolled for claims against corporations that are not present in the State and have not designated an agent for service of process. The District Court dismissed the action, finding that the Ohio tolling statute constituted an impermissible burden on interstate commerce in violation of the Commerce Clause. The Court of Appeals affirmed.

Held: The Ohio tolling statute violates the Commerce Clause, since it imposes an impermissible burden on interstate commerce. To gain the protection of the limitations period, appellee—which has no corporate office in Ohio and is not registered to do business there—would have had to appoint a resident agent for service of process in Ohio and subject itself to the Ohio courts' general jurisdiction. Ohio's statutory scheme thus forces a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense, remaining subject to suit in Ohio in perpetuity. Although statute of limitations defenses are not a fundamental right, they are an integral part of the legal system and are relied upon to project the liabilities of persons and corporations active in the commercial sphere. Such defenses may not be withdrawn from out-of-state persons or corporations on conditions repugnant to the Commerce Clause. The ability to execute service of process on foreign corporations is an important factor to consider in assessing the local interest in subjecting out-of-state entities to requirements more onerous than those imposed on domestic parties. However, Ohio cannot justify its tolling statute as a means of protecting its residents from corporations who become liable for acts done within the State but later withdraw from the jurisdiction, for the parties concede that the Ohio long-arm statute would have permitted service on appellee throughout the period of limitations. Moreover, the suggestion that appellee had the simple alternatives of designating an agent for service of process in its contract with appellant or tendering an agency appointment to the Ohio Secretary of State is not persuasive. Appellant's argument that a finding that the Ohio statute is unconstitutional should be applied prospectively only, and not to the parties in this case, will not be considered by this Court, since the argument was not presented to the courts below. Pp. 891–895.

820 F. 2d 186, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 895. REHNQUIST, C. J., filed a dissenting opinion, *post*, p. 898.

Noel C. Crowley argued the cause for appellant. With him on the brief was *James T. Murray*.

Ira J. Bornstein argued the cause for appellees. With him on the brief for Midwesco Enterprises, Inc., was *Harvey J. Barnett*.

JUSTICE KENNEDY delivered the opinion of the Court.

Ohio recognizes a 4-year statute of limitations in actions for breach of contract or fraud. The statute is tolled, however, for any period that a person or corporation is not "present" in the State. To be present in Ohio, a foreign corporation must appoint an agent for service of process, which operates as consent to the general jurisdiction of the Ohio courts. Applying well-settled constitutional principles, we find the Ohio statute that suspends limitations protection for out-of-state entities is a violation of the Commerce Clause.

I

Underlying the constitutional question presented by the Ohio statute of limitations rules is a rather ordinary contract dispute. In 1974, Midwesco Enterprises, Inc., agreed with Bendix Autolite Corporation to deliver and install a boiler system at a Bendix facility in Fostoria, Ohio. Dissatisfied with the work, Bendix claimed that the boiler system had been installed improperly and that it was insufficient to produce the quantity of steam specified in the contract. This diversity action was filed against Midwesco in the United States District Court for the Northern District of Ohio in 1980. Bendix is a Delaware corporation with its principal place of business in Ohio; Midwesco is an Illinois corporation with its principal place of business in Illinois.

When Midwesco asserted the Ohio statute of limitations as a defense, Bendix responded that the statutory period had not elapsed because under Ohio law running of the time is suspended, or tolled, for claims against entities that are not within the State and have not designated an agent for service of process.[1] Midwesco replied that this tolling provision violated both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment.

The District Court dismissed the action, finding that the Ohio tolling statute constituted an impermissible burden on interstate commerce. The Court of Appeals for the Sixth Circuit affirmed, finding that the Ohio statute constituted discrimination in violation of the Commerce Clause because it required a foreign corporation to choose between "'exposing itself to personal jurisdiction in [state] courts by complying with the tolling statute, or, by refusing to comply, to remain liable in perpetuity for all lawsuits containing state causes of action filed against it in [the State].'" 820 F. 2d 186, 188 (1987) (quoting *McKinley* v. *Combustion Engineering, Inc.*, 575 F. Supp. 942, 945 (Idaho 1983)). The Court of Appeals rejected the argument that an agent for service of process could have been appointed by Midwesco either in the contract or by giving notice to the Ohio Secretary of State. Bendix appealed, and we noted probable jurisdiction to review the constitutionality of the Ohio tolling statute. 484 U. S. 923 (1987). We now affirm.

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[1] Ohio Rev. Code Ann. § 2305.09 (1981) provides in pertinent part:

"An action for any of the following causes shall be brought within four years after the cause thereof accrued:

. . . . .

"(C) For relief on the ground of fraud."

Ohio Rev. Code Ann. § 1302.98 (1979) provides in pertinent part:

"(A) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

"(B) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach."

Ohio Rev. Code Ann. § 2305.15 (Supp. 1987) provides:

"When a cause of action accrues against a person, if he is out of the state, has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.29 of the Revised Code, does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, absconds, or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought."

II

Where the burden of a state regulation falls on interstate commerce, restricting its flow in a manner not applicable to local business and trade, there may be either a discrimination that renders the regulation invalid without more, or cause to weigh and assess the State's putative interests against the interstate restraints to determine if the burden imposed is an unreasonable one. See *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573, 578–579 (1986). The Ohio statute before us might have been held to be a discrimination that invalidates without extended inquiry. We choose, however, to assess the interests of the State, to demonstrate that its legitimate sphere of regulation is not much advanced by the statute while interstate commerce is subject to substantial restraints. We find that the burden imposed on interstate commerce by the tolling statute exceeds any local interest that the State might advance.

The burden the tolling statute places on interstate commerce is significant. Midwesco has no corporate office in

Ohio, is not registered to do business there, and has not appointed an agent for service of process in the State. To gain the protection of the limitations period, Midwesco would have had to appoint a resident agent for service of process in Ohio and subject itself to the general jurisdiction of the Ohio courts.[2] This jurisdiction would extend to any suit against Midwesco, whether or not the transaction in question had any connection with Ohio. The designation of an agent subjects the foreign corporation to the general jurisdiction of the Ohio courts in matters to which Ohio's tenuous relation would not otherwise extend. Cf. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286 (1980). The Ohio statutory scheme thus forces a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense, remaining subject to suit in Ohio in perpetuity. Requiring a foreign corporation to appoint an agent for service in all cases and to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a significant burden. See *Asahi Metal Industry Co.* v. *Superior Court*, 480 U. S. 102, 114 (1987).

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[2] Ohio Rev. Code Ann. § 2307.38.2 (1981) provides in pertinent part:

"(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to cause an action arising from the person's:

"(1) Transacting any business in this state;

"(2) Contracting to supply services or goods in this state;

"(3) Causing tortious injury by act or omission in this state;

. . . . .

"(B) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him."

Ohio Rev. Code Ann. § 1703.04.1 (1985), provides in pertinent part:

"(A) Every foreign corporation for profit that is licensed to transact business in this state, and every foreign nonprofit corporation that is licensed to exercise its corporate privileges in this state, shall have and maintain an agent, sometimes referred to as the 'designated agent,' upon whom process against such corporation may be served within this state. . . .

. . . . .

"(H) Process may be served upon a foreign corporation by delivering a copy of it to its designated agent, if a natural person, or by delivering a copy of it at the address of its agent in this state, as such address appears upon the record in the office of the secretary of state.

"(I) This section does not limit or affect the right to serve process upon a foreign corporation in any other manner permitted by law."

In part to comply with Commerce Clause concerns, Ohio Rev. Code Ann. § 1703.02 (1985), exempts corporations engaged solely in interstate commerce from the registration requirement:

"Sections 1703.01 to 1703.31, inclusive, of the Revised Code do not apply to corporations engaged in this state solely in interstate commerce, including the installation, demonstration, or repair of machinery or equipment sold by them in interstate commerce . . . ."

Section 1703.02 does not, however, remove foreign corporations from the reach of the tolling provision.

Although statute of limitations defenses are not a fundamental right, *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314 (1945), it is obvious that they are an integral part of the legal system and are relied upon to project the liabilities of persons and corporations active in the commercial sphere. The State may not withdraw such defenses on conditions repugnant to the Commerce Clause. Where a State denies ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce, the state law will be reviewed under the Commerce Clause to determine whether the denial is discriminatory on its face or an impermissible burden on commerce. The State may not condition the exercise of the defense on the waiver or relinquishment of rights that the foreign corporation would otherwise retain. Cf. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921); *Allenberg Cotton Co.* v. *Pittman*, 419 U. S. 20 (1974).

The ability to execute service of process on foreign corporations and entities is an important factor to consider in assessing the local interest in subjecting out-of-state entities to requirements more onerous than those imposed on domestic parties. It is true that serving foreign corporate defendants may be more arduous than serving domestic corporations or foreign corporations with a designated agent for service, and we have held for equal protection purposes that a State rationally may make adjustments for this difference by curtailing limitations protection for absent foreign corporations. *G. D. Searle & Co.* v. *Cohn*, 455 U. S. 404 (1982). Nevertheless, state interests that are legitimate for equal protection or due process purposes may be insufficient to withstand Commerce Clause scrutiny.[3]

In the particular case before us, the Ohio tolling statute must fall under the Commerce Clause. Ohio cannot justify its statute as a means of protecting its residents from corporations who become liable for acts done within the State but later withdraw from the jurisdiction, for it is conceded by all parties that the Ohio long-arm statute would have permitted service on Midwesco throughout the period of limitations. The Ohio statute of limitations is tolled only for those foreign corporations that do not subject themselves to the general jurisdiction of Ohio courts. In this manner the Ohio statute imposes a greater burden on out-of-state companies than it does on Ohio companies, subjecting the activities of foreign and domestic corporations to inconsistent regulations. *CTS Corp.* v. *Dynamics Corp. of America*, 481 U. S. 69, 87–89 (1987).

The suggestion that Midwesco had the simple alternatives of designating an agent for service of process in its contract with Bendix or tendering an agency appointment to the Ohio Secretary of State is not persuasive. Initially, there is no statutory support for either option, and it is speculative that either device would have satisfied the Ohio requirements for the continued running of the limitations period. In any event, a designation with the Ohio Secretary of State of an agent for the service of process likely would have subjected Midwesco to the general jurisdiction of Ohio courts over transactions in which Ohio had no interest. As we have already concluded, this exaction is an unreasonable burden on commerce.

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[3] In *Searle*, we declined to reach the issue whether the New Jersey tolling statute impermissibly burdened interstate commerce, finding that the issue was "clouded by an ambiguity in state law," and remanded the case to the Court of Appeals. 455 U. S., at 413–414. The Court of Appeals then remanded to the District Court "for further consideration of the Commerce Clause issue." *Hopkins* v. *Kelsey-Hayes, Inc.*, 677 F. 2d 301, 302 (CA3 1982). Before the District Court ruled, however, the New Jersey Supreme Court declared its tolling statute unconstitutional under a Commerce Clause analysis as a forced licensure provision, a decision we declined to review. *Coons* v. *American Honda Motor Co.*, 94 N. J. 307, 463 A. 2d 921 (1983), cert. denied, 469 U. S. 1123 (1985).

Finally, Bendix argues that if we find the Ohio statute is unconstitutional, our ruling should be applied prospectively only, and not to the parties in this case. See *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106 (1971); *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 88 (1982). The Sixth Circuit refused to consider the argument because it was raised for the first time in Bendix's reply brief. 820 F. 2d, at 189. As the argument was not presented to the courts below, it will not be considered here. *Brown* v. *Socialist Workers '74 Campaign Committee*, 459 U. S. 87, 104–105 (1982) (BLACKMUN, J., concurring in part).

Affirmed.

JUSTICE SCALIA, concurring in the judgment.

I cannot confidently assess whether the Court's evaluation and balancing of interests in this case is right or wrong. Although the Court labels the effect of exposure to the general jurisdiction of Ohio's courts "a significant burden" on commerce, I am not sure why that is. In precise terms, it is the burden of defending in Ohio (rather than some other forum) any lawsuit having all of the following features: (1) the plaintiff desires to bring it in Ohio, (2) it has so little connection to Ohio that service could not otherwise be made under Ohio's long-arm statute, and (3) it has a great enough connection to Ohio that it is not subject to dismissal on *forum non conveniens* grounds. The record before us supplies no indication as to how many suits fit this description (even the present suit is not an example since appellee Midwesco Enterprises was subject to long-arm service, *ante*, at 894), and frankly I have no idea how one would go about estimating the number. It may well be "significant," but for all we know it is "negligible."

A person or firm that takes the other alternative, by declining to appoint a general agent for service, will remain theoretically subject to suit in Ohio (as the Court says) "in perpetuity"—at least as far as the statute of limitations is concerned. But again, I do not know how we assess how significant a burden this is, unless anything that is theoretically perpetual must be significant. It seems very unlikely that anyone would intentionally wait to sue later rather than sooner—not only because the prospective defendant may die or dissolve, but also because prejudgment interest is normally not awarded, and the staleness of evidence generally harms the party with the burden of proof. The likelihood of an unintentionally delayed suit brought under this provision that could not be brought without it seems not enormously large. Moreover, whatever the likelihood is, it does not seem terribly plausible that any real-world deterrent effect on interstate transactions will be produced by the incremental cost of having to defend a *delayed* suit rather than a *timely* suit. But the point is, it seems to me we can do no more than speculate.

On the other side of the scale, the Court considers the benefit of the Ohio scheme to local interests. These are, presumably, to enable the preservation of claims against defendants who have placed themselves beyond the personal jurisdiction of Ohio courts, and (by encouraging appointment of an agent) to facilitate service upon out-of-state defendants who might otherwise be difficult to locate. See *G. D. Searle & Co.* v. *Cohn*, 455 U. S. 404, 410 (1982) (it is "a reasonable assumption that unrepresented foreign corporations, as a general rule, may not be so easy to find and serve"). We have no way of knowing how often these ends are in fact achieved, and the Court thus says little about them except to call them "an important factor to consider." *Ante*, at 893.

Having evaluated the interests on both sides as roughly as this, the Court then proceeds to judge which is more important. This process is ordinarily called "balancing," *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970), but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy. All I am really persuaded of by the Court's opinion is that the burdens the Court labels "significant" are more determinative of its decision than the benefits it labels "important." Were it not for the brief implication that there is here a discrimination unjustified by *any* state interest, see *ante*, at 894, I suggest an opinion could as persuasively have been written coming out the opposite way. We sometimes make similar "balancing" judgments in determining how far the needs of the State can intrude upon the liberties of the individual, see, *e. g.*, *Boos* v. *Barry*, 485 U. S. 312, 324 (1988), but that is of the essence of the courts' function as the nonpolitical branch. Weighing the governmental interests of a State against the needs of interstate commerce is, by contrast, a task squarely within the responsibility of Congress, see U. S. Const., Art. I, § 8, cl. 3, and "ill suited to the judicial function." *CTS Corp.* v. *Dynamics Corp. of America*, 481 U. S. 69, 95 (1987) (SCALIA, J., concurring in part and concurring in judgment).

I would therefore abandon the "balancing" approach to these negative Commerce Clause cases, first explicitly adopted 18 years ago in *Pike* v. *Bruce Church, Inc.*, *supra*, and leave essentially legislative judgments to the Congress. Issues already decided I would leave untouched, but would adopt for the future an analysis more appropriate to our role and our abilities. This does no damage to the interests protected by the doctrine of *stare decisis*. Since the outcome of any particular still-undecided issue under the current methodolgy is in my view not predictable—except within the broad range that would in any event come out the same way under the test I would apply—no expectations can possibly be upset. To the contrary, the ultimate objective of the rule of *stare decisis* will be furthered. Because the outcome of the test I would apply is considerably more clear, confident expectations will more readily be able to be entertained.

In my view, a state statute is invalid under the Commerce Clause if, and only if, it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose. When such a validating purpose exists, it is for Congress and not us to determine it is not significant enough to justify the burden on commerce. The Ohio tolling statute, Ohio Rev. Code Ann. § 2305.15 (Supp. 1987), is on its face discriminatory because it applies only to out-of-state corporations. That facial discrimination cannot be justified on the basis that "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives," *New Energy Co. of Indiana* v. *Limbach, ante,* at 278. A tolling statute that operated only against persons beyond the reach of Ohio's long-arm statute, or against all persons that could not be found for mail service, would be narrowly tailored to advance the legitimate purpose of preserving claims; but the present statute extends the time for suit even against corporations which (like Midwesco Enterprises) are fully suable within Ohio, and readily reachable through the mails.

Because the present statute discriminates against interstate commerce by applying a disadvantageous rule against nonresidents for no valid state purpose that requires such a rule, I concur in the judgment that the Ohio statute violates the Commerce Clause.

CHIEF JUSTICE REHNQUIST, dissenting.

This case arises because of two peculiar, if not unique, rules of Ohio law. The first is that even though a foreign corporation may be subject to process under the state "long-arm" statute, it is nonetheless not "present" in the State for purposes of tolling the statute of limitations. The second is that a foreign corporation installing machinery or equipment sold by it in interstate commerce is not required to appoint a statutory agent in order to transact business in Ohio. Ohio Rev. Code § 1703.02 (Supp. 1987). The Court dwells heavily upon the first peculiarity of Ohio law, but makes no mention of the second.

Midwesco agreed to deliver and install a boiler system at a Bendix plant in Fostoria, Ohio. On the basis of the sparse record before us, it is fair to say that while the sale may have been a transaction in interstate commerce, there is no reason at all to think that the installation was such. Cases such as *Allenberg Cotton Co.* v. *Pittman*, 419 U. S. 20 (1974), and *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921), on which the Court relies, deal with transactions respecting goods which are "in the stream of interstate commerce." 419 U. S., at 30. A State may not require licensure of a foreign corporation which seeks only to engage in this sort of transaction. But a State may require licensure when a foreign corporation engages in intrastate commerce. *Eli Lilly & Co.* v. *Sav-On-Drugs, Inc.*, 366 U. S. 276 (1961). And where a foreign corporation is engaged in both interstate and intrastate commerce in a particular commodity, a State may require licensure in order to sue in connection with an intrastate aspect of the business. *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202 (1944).

Thus, Midwesco's immunity from Ohio's requirement that foreign corporations appoint a statutory agent before doing business in the State is not by reason of any federal constitutional right, but by reason of a provision of the Ohio statutes. And if Ohio could have insisted that Midwesco appoint a statutory agent before it engaged in that portion of its transaction with Bendix which was intrastate commerce, I see no reason why it may not also treat Midwesco as it would treat any other entity which has done intrastate business in Ohio, incurred liability, and thereafter withdrawn from the State. Ohio seeks to do no more, I think, when it applies its tolling statute to Bendix's action against Midwesco under these circumstances. I see no discrimination against interstate commerce here, and I would reverse the judgment of the Court of Appeals.

REPORTER'S NOTE

The next page is purposely numbered 1001. The numbers between 900 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

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ORDERS FROM MAY 16 THROUGH JUNE 16, 1988

MAY 16, 1988

Appeals Dismissed

No. 86–1857. CONTINENTAL BANK INTERNATIONAL *v.* CITY OF NEW YORK, DEPARTMENT OF FINANCE. Appeal from Ct. App. N. Y. Motion of appellant for leave to file Rule 28.1 listing under seal granted. Appeal dismissed for want of substantial federal question. JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 69 N. Y. 2d 281, 506 N. E. 2d 525.

No. 87–1376. CITY OF EUCLID, OHIO *v.* SHANK, DIRECTOR, OHIO ENVIRONMENTAL PROTECTION AGENCY. Appeal from Sup. Ct. Ohio dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87–1601. BELL, INDIVIDUALLY AND DBA WES OUTDOOR ADVERTISING CO. *v.* NEW JERSEY ET AL. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 833 F. 2d 303.

No. 87–1619. GREEN *v.* WATERTOWN EQUIPMENT CO. ET AL. Appeal from C. A. 8th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 830 F. 2d 1487.

No. 87–1441. EVERS *v.* BOARD OF MEDICAL EXAMINERS ET AL. Appeal from Ct. Civ. App. Ala. dismissed for want of substantial federal question. Reported below: 516 So. 2d 650.

No. 87–6481. SALAZAR *v.* OHIO CIVIL RIGHTS COMMISSION ET AL. Appeal from Ct. App. Ohio, Lucas County, dismissed for want of substantial federal question. Reported below: 39 Ohio App. 3d 26, 528 N. E. 2d 1303.

No. 87-1542. EWING *v.* ARIZONA ET AL. Appeal from Sup. Ct. Ariz. dismissed for want of jurisdiction. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 155 Ariz. 200, 745 P. 2d 947.

No. 87-1597. ALABAMA POWER CO. *v.* CAPPS, ADMINISTRATRIX OF THE ESTATE OF CAPPS. Appeal from Sup. Ct. Ala. dismissed for want of properly presented federal question. Reported below: 519 So. 2d 1328.

No. 87-1653. VARNEY ET AL. *v.* FLORIDA BAR ET AL. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Reported below: 518 So. 2d 251.

Certiorari Granted—Vacated and Remanded

No. 86-7126. HOUSTON *v.* ALABAMA. Ct. Crim. App. Ala. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position presently asserted by the Attorney General of Alabama in his motion filed April 14, 1988. JUSTICE BLACKMUN dissents. Reported below: 502 So. 2d 401.

No. 87-1243. UNITED STATES *v.* A & B HEATING & AIR CONDITIONING, INC. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals to consider the question of mootness. Reported below: 823 F. 2d 462.

No. 87-1425. BAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mathews* v. *United States*, 485 U. S. 58 (1988). Reported below: 838 F. 2d 463.

Miscellaneous Orders

No. — ——. EKIN ET AL. *v.* BOARD OF COMMISSIONERS OF THE COUNTY OF ALLEGHENY ET AL.;

No. — ——. POE *v.* UNITED STATES; and

No. — ——. WILLIAMS ET AL. *v.* WASHINGTON ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. A-831 (87-6873). ARANDA *v.* TEXAS. Application to continue the stay of mandate of the Court of Criminal Appeals of

Texas, presented to JUSTICE WHITE, and by him referred to the Court, granted pending this Court's action on the petition for writ of certiorari. If the petition for writ of certiorari is denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue in effect pending the issuance of the mandate of this Court.

No. D-692. IN RE DISBARMENT OF KALK. Motion to defer proceedings in this matter granted. [For earlier order herein, see 485 U. S. 984.]

No. D-707. IN RE DISBARMENT OF BLECHER. It is ordered that Sam Blecher, of Spring Valley, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-708. IN RE DISBARMENT OF LEWIS. It is ordered that Samuel H. Lewis, of Pompano Beach, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 94, Orig. SOUTH CAROLINA *v.* BAKER, SECRETARY OF THE TREASURY. Request of the Honorable Matthew J. Jasen to be discharged as Special Master granted, and he is hereby discharged. JUSTICE KENNEDY took no part in the consideration or decision of this case. [For earlier decision herein, see, *e. g.*, 485 U. S. 505.]

No. 87-1428. LORANCE ET AL. *v.* AT&T TECHNOLOGIES, INC., ET AL. C. A. 7th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 87-1495. TALLAHASSEE BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* LEON COUNTY, FLORIDA, ET AL. C. A. 11th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE MARSHALL took no part in the consideration or decision of this order.

No. 87-6702. AGUILAR *v.* TEXAS. Ct. App. Tex., 11th Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 6, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of certiorari in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 87–6622. IN RE MARTIN; and

No. 87–6671. IN RE DENNIS. Petitions for writs of mandamus denied.

No. 87–6616. IN RE MARTIN. Petition for writ of mandamus and/or prohibition denied.

No. 87–1687. IN RE ZEPKE. Petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 87–453. AMERADA HESS CORP. ET AL. *v.* DIRECTOR, DIVISION OF TAXATION, NEW JERSEY DEPARTMENT OF THE TREASURY; and

No. 87–464. TEXACO INC. ET AL. *v.* DIRECTOR, DIVISION OF TAXATION, NEW JERSEY DEPARTMENT OF THE TREASURY. Appeals from Sup. Ct. N. J. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. JUSTICE O'CONNOR took no part in the consideration or decision of these cases. Reported below: 107 N. J. 307, 526 A. 2d 1029.

Certiorari Granted. (See also No. 85–1765, *ante*, at 76.)

No. 87–1346. BONITO BOATS, INC. *v.* THUNDER CRAFT BOATS, INC. Sup. Ct. Fla. Certiorari granted. Reported below: 515 So. 2d 220.

No. 87–1602. CASTILLE, DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, ET AL. *v.* PEOPLES. C. A. 3d Cir. Certiorari granted. Reported below: 838 F. 2d 462.

No. 87–6431. SCHMUCK *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 840 F. 2d 384.

No. 87–6405. TOMPKINS *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted.* JUSTICE O'CONNOR took no part in the consideration or decision of this motion and petition. Reported below: 774 S. W. 2d 195.

Certiorari Denied. (See also Nos. 87-1376, 87-1601, and 87-1619, *supra.*)

No. 85-2094. SHARP ELECTRONICS CORP. *v.* BUSINESS ELECTRONICS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 780 F. 2d 1212.

No. 86-484. WESTMAN COMMISSION CO. *v.* HOBART INTERNATIONAL, INC. C. A. 10th Cir. Certiorari denied. Reported below: 796 F. 2d 1216.

No. 86-794. GARMENT DISTRICT, INC. *v.* BELK STORES SERVICES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 799 F. 2d 905.

No. 86-1101. MCCABE'S FURNITURE, INC. *v.* LA-Z-BOY CHAIR CO. C. A. 8th Cir. Certiorari denied. Reported below: 798 F. 2d 323.

No. 87-323. SOKOLOV *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 814 F. 2d 864.

No. 87-610. ISAKSEN, DBA APPLEWOOD STOVE WORKS *v.* VERMONT CASTINGS, INC.; and
No. 87-728. VERMONT CASTINGS, INC. *v.* ISAKSEN, DBA APPLEWOOD STOVE WORKS. C. A. 7th Cir. Certiorari denied. Reported below: 825 F. 2d 1158.

No. 87-1217. LORENZINI ET UX. *v.* NEW JERSEY. Super. Ct. N. J., Bergen County. Certiorari denied.

No. 87-1281. GRIFFIN ET AL. *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 823 F. 2d 1476.

No. 87-1311. LAU ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 828 F. 2d 871.

No. 87-1331. PAN-AMERICAN LIFE INSURANCE CO. ET AL. *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied.

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*[REPORTER'S NOTE: For amendment of this order, see *post*, p. 1053.]

No. 87–1359. DEMENNO/KERDOON *v.* UNITED STATES; and
No. 87–1380. TIPPERARY REFINING CO. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 833 F. 2d 301.

No. 87–1365. AIUPPA *v.* UNITED STATES;
No. 87–1409. LAPIETRA *v.* UNITED STATES;
No. 87–1419. CERONE *v.* UNITED STATES;
No. 87–1446. LOMBARDO *v.* UNITED STATES; and
No. 87–1543. ROCKMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 830 F. 2d 938.

No. 87–1369. LAFORTE ET AL. *v.* HORNER, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 833 F. 2d 977.

No. 87–1373. BOWERS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 828 F. 2d 1169.

No. 87–1403. FREEMAN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 184 Ga. App. 678, 362 S. E. 2d 413.

No. 87–1404. NAMER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 1084.

No. 87–1424. VIRGINIA EX REL. STATE BOARD OF ELECTIONS *v.* KILGORE ET AL.; and
No. 87–1573. KILGORE ET AL. *v.* VIRGINIA EX REL. STATE BOARD OF ELECTIONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 1319.

No. 87–1431. LANZARO, MONMOUTH COUNTY SHERIFF, ET AL. *v.* MONMOUTH COUNTY, NEW JERSEY, CORRECTIONAL INSTITUTIONAL INMATES, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 834 F. 2d 326.

No. 87–1451. ROACH *v.* NATIONAL TRANSPORTATION SAFETY BOARD ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 804 F. 2d 1147.

No. 87–1529. PSGROUP *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA (PRICE ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 871.

No. 87–1536. SUGGS ET UX. *v.* STATE FARM FIRE & CASUALTY CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 833 F. 2d 883.

No. 87–1545. CLEU *v.* O'CONNOR HOSPITAL, INC., ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 87–1549. JOINT BOARD OF CONTROL OF THE FLATHEAD, MISSION, AND JOCKO IRRIGATION DISTRICTS *v.* CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION. C. A. 9th Cir. Certiorari denied. Reported below: 832 F. 2d 1127.

No. 87–1550. DERR ET AL. *v.* KAWASAKI KISEN K.K. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 835 F. 2d 490.

No. 87–1552. STEFANOU *v.* NORTH RIVER INSURANCE CO., INC. C. A. 4th Cir. Certiorari denied. Reported below: 831 F. 2d 484.

No. 87–1557. 1000 FRIENDS OF OREGON ET AL. *v.* WASCO COUNTY COURT ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 304 Ore. 76, 742 P. 2d 39.

No. 87–1559. ROSE *v.* FULTZ. C. A. 9th Cir. Certiorari denied. Reported below: 820 F. 2d 407.

No. 87–1561. REED, DISTRICT ATTORNEY, WASHINGTON PARISH, LOUISIANA *v.* SMITH. C. A. 5th Cir. Certiorari denied. Reported below: 836 F. 2d 1344.

No. 87–1562. O'KEEFE *v.* BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF FLOSSMOOR, ILLINOIS, ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 159 Ill. App. 3d 1167, 526 N. E. 2d 212.

No. 87–1563. MATT *v.* LAROCCA, COMMISSIONER, NEW YORK STATE DEPARTMENT OF TRANSPORTATION. Ct. App. N. Y. Certiorari denied. Reported below: 71 N. Y. 2d 154, 518 N. E. 2d 1172.

No. 87–1568. ALLEN TRANSFORMER CO. *v.* RAGLAND, COMMISSIONER OF REVENUES OF ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 293 Ark. 601, 740 S. W. 2d 133.

No. 87–1574. LUHR BROS., INC. *v.* DALE. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 158 Ill. App. 3d 402, 511 N. E. 2d 933.

No. 87-1577. GORDON ET AL. *v.* HUNT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 835 F. 2d 452.

No. 87-1579. JEFFERS *v.* EVATT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 835 F. 2d 522.

No. 87-1585. GOUIRAN *v.* COMMITTEE ON CHARACTER AND FITNESS, SECOND DEPARTMENT. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 87-1587. YAMEEN *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 401 Mass. 331, 516 N. E. 2d 1149.

No. 87-1590. SAGANSKY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 843 F. 2d 1384.

No. 87-1592. KYOCERA INTERNATIONAL, INC., ET AL. *v.* KENNECOTT CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 835 F. 2d 1419.

No. 87-1596. NOBILE *v.* SCHINDLER ET AL. C. A. 1st Cir. Certiorari denied.

No. 87-1606. DAVIS, WARDEN *v.* JONES. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 835.

No. 87-1611. CITY OF HOUSTON ET AL. *v.* LEROY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 831 F. 2d 576.

No. 87-1612. BRITAIN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 518 So. 2d 198.

No. 87-1620. SIMMONS *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 13 Conn. App. 804, 534 A. 2d 628.

No. 87-1624. JONES *v.* VERBIEST ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 836 F. 2d 1348.

No. 87-1633. SIKORSKI AIRCRAFT DIVISION, UNITED TECHNOLOGIES CORP. *v.* KLOSS ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 87-1638. LARSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 833 F. 2d 758.

No. 87-1662. SPENCER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 1216.

No. 87-1677. ANGELICA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 87-1679. RIVERA *v.* FRANK, POSTMASTER GENERAL OF THE UNITED STATES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 830 F. 2d 1037.

No. 87-1681. DE LA FUENTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 796 F. 2d 1394 and 837 F. 2d 436.

No. 87-1692. MAROTTA *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 837 F. 2d 1096.

No. 87-1721. MCGREGOR *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 87-5205. RAMSEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 815 F. 2d 715.

No. 87-5726. BUCKLEY *v.* BUTLER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 825 F. 2d 895.

No. 87-5982. HAYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 827 F. 2d 766.

No. 87-6155. GRAYSON *v.* UNITED STATES (two cases). Ct. App. D. C. Certiorari denied. Reported below: 488 A. 2d 1314 (first case).

No. 87-6174. IRON BOY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 301.

No. 87-6183. INGRAHAM, AKA MACKEIL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 832 F. 2d 229.

No. 87-6234. WHALEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 830 F. 2d 1469.

No. 87-6252. MORGAN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 257 Ga. 596, 361 S. E. 2d 793.

No. 87-6289. OLMSTEAD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 832 F. 2d 642.

No. 87–6331. FINNEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 87–6354. HERNANDEZ-SUAZO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1093.

No. 87–6355. ROBINSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 832 F. 2d 366.

No. 87–6361. OWEN *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 515 So. 2d 263.

No. 87–6371. PORTAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1069.

No. 87–6383. POMEROY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 830 F. 2d 197.

No. 87–6384. WATSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 536 A. 2d 1056.

No. 87–6395. KIMBERLIN *v.* BREWER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 825 F. 2d 1157.

No. 87–6397. GUINN *v.* GUINN. Sup. Ct. Va. Certiorari denied.

No. 87–6426. GIBSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 463.

No. 87–6433. PELTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 835 F. 2d 1067.

No. 87–6443. GOURLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 835 F. 2d 249.

No. 87–6520. THOMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 835 F. 2d 219.

No. 87–6527. JONES *v.* ST. LOUIS–SAN FRANCISCO RAILWAY. C. A. 6th Cir. Certiorari denied. Reported below: 834 F. 2d 172.

No. 87–6549. BLANNON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 843.

No. 87–6559. FLEMMINGS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 87-6560. Pace *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 1307.

No. 87-6598. Phillippe *v.* Shapell Industries, Inc. Sup. Ct. Cal. Certiorari denied. Reported below: 43 Cal. 3d 1247, 743 P. 2d 1279.

No. 87-6610. Williams *v.* Christensen, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 87-6611. Robinson *v.* Secretary of Health and Human Services. C. A. 9th Cir. Certiorari denied. Reported below: 835 F. 2d 1436.

No. 87-6621. Bilder *v.* City of Akron, Ohio. Ct. App. Ohio, Summit County. Certiorari denied.

No. 87-6626. Gassett *v.* Scully, Superintendent, Green Haven Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 87-6629. Rechtmann *v.* United States. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 448.

No. 87-6631. Garcia *v.* Turner, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 837 F. 2d 480.

No. 87-6632. Kennison *v.* Vermont. Sup. Ct. Vt. Certiorari denied. Reported below: 149 Vt. 643, 546 A. 2d 190.

No. 87-6635. Gindorf *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 159 Ill. App. 3d 647, 512 N. E. 2d 770.

No. 87-6637. Refre *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 833 F. 2d 1022.

No. 87-6642. Horton *v.* Tabah. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1092.

No. 87-6646. Samuels *v.* Ohio. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 87-6648. May *v.* Warner AMEX Cable Communications et al. C. A. 6th Cir. Certiorari denied. Reported below: 836 F. 2d 1348.

No. 87-6649. MADDEN *v.* TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 830 F. 2d 194.

No. 87-6654. SHEELY ET AL. *v.* UNIVERSITY OF TEXAS BOARD OF REGENTS. C. A. 5th Cir. Certiorari denied. Reported below: 833 F. 2d 1009.

No. 87-6657. HEREDIA *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 87-6658. SALLEE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 838 F. 2d 1203.

No. 87-6659. VAN STRATEN *v.* KEENE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 834 F. 2d 173.

No. 87-6660. WINPENNY *v.* WINPENNY. Super. Ct. Pa. Certiorari denied. Reported below: 356 Pa. Super. 593, 512 A. 2d 55.

No. 87-6661. BAKER *v.* ESTELLE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 1015.

No. 87-6664. REID *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 820 F. 2d 1220.

No. 87-6665. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 2d 1219.

No. 87-6668. FEASTER *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 87-6670. LYNCH *v.* JOHNSON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 461.

No. 87-6672. ALBERNI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 87-6675. FREEMAN *v.* JAGO. C. A. 6th Cir. Certiorari denied. Reported below: 835 F. 2d 878.

No. 87-6677. BRADLEY *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 834 F. 2d 645.

No. 87-6678. GLIVINGS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 37.

No. 87-6681. CORTEZ *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied.

No. 87-6682. KEITH *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied.

No. 87-6683. HILGERT *v.* CITY OF PRAIRIE VILLAGE. Sup. Ct. Kan. Certiorari denied. Reported below: 242 Kan. 902.

No. 87-6684. FREDERICK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 835 F. 2d 1211.

No. 87-6691. BURNSIDE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 868.

No. 87-6692. BECKER *v.* WENCO FOODS/WENDY'S INTERNATIONAL INC. C. A. 2d Cir. Certiorari denied. Reported below: 823 F. 2d 544.

No. 87-6693. BELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 833 F. 2d 272.

No. 87-6696. COOKE *v.* BACH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 1215.

No. 87-6706. ASHLEY *v.* KOEHLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 840 F. 2d 16.

No. 87-6710. CUBILLOS *v.* UNITED STATES; and
No. 87-6711. ZAPATA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 168.

No. 87-6714. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 463.

No. 87-6722. ROBINSON-ROBINSON ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 840 F. 2d 23.

No. 87-6727. COLEMAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 87-6728. O'NEAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 840 F. 2d 13.

No. 87-6729. WILSON *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 1211.

No. 87-6732. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 1343.

No. 87-6734. FALCON *v.* HUTCHISON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 835 F. 2d 1434.

No. 87-6736. ALDRICH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 838 F. 2d 1217.

No. 87-6739. LEVEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 842 F. 2d 335.

No. 87-6747. MCFARLAND *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 839 F. 2d 1239.

No. 87-6748. TRACY ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 835 F. 2d 1267.

No. 87-6750. MITCHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 1018.

No. 87-6765. ABDUS-SAMMAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 843 F. 2d 1388.

No. 87-6776. MCGOVERN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 818 F. 2d 872.

No. 87-6778. RHODES *v.* OHIO DEPARTMENT OF REHABILITATION AND CORRECTION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 840 F. 2d 17.

No. 87-6779. PETERS *v.* RICHLAND COUNTY, SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 547.

No. 87-6781. SVEE *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 141 Wis. 2d 980, 415 N. W. 2d 862.

No. 86-1548. NORTHWEST AIRLINES, INC. *v.* AIR LINE PILOTS ASSN., INTERNATIONAL. C. A. D. C. Cir. Motion of Air Transport Association of America et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 257 U. S. App. D. C. 181, 808 F. 2d 76.

No. 87-1321. LOMBARDFIN S. P. A. ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION; and

No. 87–1368. TRASATLANTIC FINANCIAL CO., S. A., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. JUSTICE MARSHALL took no part in the consideration or decision of these petitions. Reported below: 833 F. 2d 1086.

No. 87–1332. CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 265 U. S. App. D. C. 226, 830 F. 2d 374.

No. 87–1377. CHURCH OF SCIENTOLOGY OF CALIFORNIA *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 823 F. 2d 1310.

No. 87–1433. KERN TULARE WATER DISTRICT *v.* CITY OF BAKERSFIELD, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 828 F. 2d 514.

JUSTICE WHITE, dissenting.

This Court has previously held that a municipality is immune from antitrust liability under the state-action exemption if it can demonstrate that "it is engaging in the challenged activity pursuant to a clearly expressed state policy." *Hallie* v. *Eau Claire*, 471 U. S. 34, 40 (1985); see *Parker* v. *Brown*, 317 U. S. 341 (1943). It is not necessary that the legislature explicitly state that it intends municipalities to engage in anticompetitive conduct pursuant to the state policy; it is enough that "anticompetitive effects logically would result from [the] broad authority to regulate." *Hallie, supra*, at 42. From these principles, I had thought it clear that an antitrust violation would be established by showing that a municipality restrained trade by acting contrary to the clearly articulated state policy. Yet the Ninth Circuit has held here that ordinary "abuses" by local authorities in the field generally covered by the state policy are matters for state tribunals and not concerns of federal antitrust policy. 828 F. 2d 514, 522 (1987).

The mischief of this unwarranted expansion of the state-action exemption can be seen in the facts of this case. All agree that an integral part of California's state water policy is its prohibition against waste and unreasonable uses of water. *Id.*, at 519 (citing Cal. Const., Art. 10, §2; Cal. Water Code Ann. §106.5 (West 1971)). Furthermore, the state policy expressly encourages municipalities to transfer water rights so as to improve the efficiency of water use. Cal. Water Code Ann. §109 (West Supp. 1987). Here, petitioner water district alleged that respondent city controlled sources of water exceeding its annual needs, was in the business of reselling the surplus water for rural irrigation, and had entered a 35-year contract with petitioner, providing that petitioner would pay respondent $400,000 per year for 20,000 acre-feet of water per year. The water district alleged that, contrary to past years under the contract, the city refused to allow the district to transfer excess water to third parties, who evidenced their need for it by their willingness to pay. The city sent a letter explaining its stance as necessary to effectuate the contractual provision requiring that the water be used only by the district. Because the city refused to allow the district to transfer the water to third parties and because the district did not need the water, it eventually ran into the state aqueduct, either to be wasted as runoff into the sea or to flow to communities outside of the Kern County water basin. Whatever the fate of the dumped water, petitioner alleges that the city prevented the transfer to maintain its control of the resale market for irrigation water in Kern County.

The irony of the Ninth Circuit's decision is its bestowing of antitrust immunity for such conduct based on a state statutory scheme, which is intended to promote efficient use of water and prevent its waste. It seems questionable that the contractual prohibition of transfer rights, possibly resulting in the waste of the water and certainly preventing an efficient transfer, was the kind of action that the California Legislature contemplated when it enacted the statutory scheme. *Hallie, supra*, at 44. Municipal actions that contravene express limits in the state policy would not seem to be taken pursuant to a clearly articulated policy and thus would not seem to be shielded by the state-action exemption. The Ninth Circuit's characterization of the alleged violation of state policy as an ordinary error or occasional abuse seems insufficient to insulate the municipality from liability for action that restrains competition. There seems little room in the Sherman Act's prohibition of restraint of trade for such a forgiving rule.

Because I do not believe that every municipality deserves one free anticompetitive bite, I would grant certiorari.

No. 87–1560. MERCEDES-BENZ OF NORTH AMERICA, INC. *v.* METRIX WAREHOUSE, INC., ET AL. C. A. 4th Cir. Motion of Automobile Importers of America et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 828 F. 2d 1033.

No. 87–1598. NORTHERN GROUP SERVICES, INC., ET AL. *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL. C. A. 6th Cir. Motion of Thorn Apple Valley, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 833 F. 2d 85.

No. 87–1625. FLORIDA *v.* LONG. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 517 So. 2d 664.

No. 87–6189. ERICKSON *v.* ILLINOIS. Sup. Ct. Ill.;
No. 87–6287. BROWN *v.* LOUISIANA. Sup. Ct. La.;
No. 87–6372. DESHIELDS *v.* DELAWARE. Sup. Ct. Del.;
No. 87–6601. NELSON *v.* ALABAMA. Sup. Ct. Ala.;
No. 87–6607. ANTWINE *v.* MISSOURI. Sup. Ct. Mo.;
No. 87–6627. FRAZIER *v.* GEORGIA. Sup. Ct. Ga.;
No. 87–6634. PORTERFIELD *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 87–6636. AMRINE *v.* MISSOURI. Sup. Ct. Mo.; and
No. 87–6713. TURNER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: No. 87–6189, 117 Ill. 2d 271, 513 N. E. 2d 367; No. 87–6287, 514 So. 2d 99; No. 87–6372, 534 A. 2d 630; No. 87–6601, 511 So. 2d 248; No. 87–6607, 743 S. W. 2d 51; No. 87–6627, 257 Ga. 690, 362 S. E. 2d 351; No. 87–6634, 746 S. W. 2d 441; No. 87–6636, 741 S. W. 2d 665; No. 87–6713, 234 Va. 543, 364 S. E. 2d 483.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 87–6425. FOUCHE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 833 F. 2d 1284.

Rehearing Denied

No. 87–820. KELLAM ET AL. *v.* PFEIFER ET AL., 484 U. S. 1052;

No. 87–1316. IN RE COOPER, DBA LARRY N. COOPER THE PROPRIETORSHIP, 485 U. S. 957;

No. 87–1329. BROWNING *v.* CHEVRON U. S. A. INC. ET AL., 485 U. S. 963;

No. 87–5917. SIMDRAM *v.* UNITED STATES, 485 U. S. 978;

No. 87–5983. WATSON *v.* MISSOURI ET AL., 485 U. S. 964;

No. 87–6064. SEABORNE *v.* COUNTY COMMISSIONERS OF WASHINGTON COUNTY, 484 U. S. 1053;

No. 87–6074. ROBINSON *v.* AMTRAK RAILROAD CORPORATION ET AL., 485 U. S. 965;

No. 87–6231. CASSELL *v.* MOUNT JOY MENNONITE CHURCH ET AL., 485 U. S. 965;

No. 87–6232. CASSELL *v.* CHARLES, 485 U. S. 965;

No. 87–6259. MOHIUDDIN *v.* CALIFORNIA, 485 U. S. 950;

No. 87–6392. DIGGS *v.* OWENS, SUPERINTENDENT, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL., 485 U. S. 979;

No. 87–6398. LIPSEY *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL., 485 U. S. 979;

No. 87–6402. GENTILE *v.* MONTEFIORE HOSPITAL, INC., ET AL., 485 U. S. 979;

No. 87–6427. PETERS *v.* MCCUTCHEON ET AL., 485 U. S. 990; and

No. 87–6488. HILL *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, 485 U. S. 980. Petitions for rehearing denied.

No. 85–1029. STARKMAN *v.* MARATHON OIL CO. ET AL., 475 U. S. 1015. Motion for leave to file petition for rehearing denied. JUSTICE SCALIA and JUSTICE KENNEDY took no part in the consideration or decision of this motion.

No. 86–870. PHILLIPS PETROLEUM CO. ET AL. *v.* MISSISSIPPI ET AL., 484 U. S. 469. Motions of City of Elizabeth, New Jersey, et al., Louisiana Landowners Association, Inc., and American Land Title Association for leave to file briefs as *amici curiae* in support of petition for rehearing denied. Petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of these motions and this petition.

No. 86-987. **Haig et al.** *v.* **Bissonette et al.**, 485 U. S. 264. Petition for rehearing dismissed. **The Chief Justice, Justice O'Connor, Justice Scalia,** and **Justice Kennedy** took no part in the consideration or decision of this petition.

No. 87-688. **Zemsky** *v.* **City of New York et al.**, 484 U. S. 965. Petition for rehearing denied. **Justice Kennedy** took no part in the consideration or decision of this petition.

No. 87-1008. **Hayes** *v.* **Anson et al.**, 484 U. S. 1063. Motion for leave to file petition for rehearing denied.

No. 87-1320. **Rosenbaum** *v.* **Rosenbaum**, 485 U. S. 950. Petition for rehearing and other relief denied.

No. 87-5316. **Davis** *v.* **Xerox Corp.**, 484 U. S. 966. Motion for leave to file petition for rehearing denied. **Justice Kennedy** took no part in the consideration or decision of this motion.

MAY 20, 1988

Dismissal Under Rule 53

No. 87-1349. **County of Boulder, Colorado** *v.* **United States et al.** C. A. 10th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 822 F. 2d 1466.

MAY 23, 1988

Appeal Dismissed

No. 87-1650. **Brannon** *v.* **Randmaa.** Appeal from Ct. App. Tex., 3d Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 736 S. W. 2d 175.

Certiorari Granted—Vacated and Remanded

No. 86-181. **Dixon** *v.* **Westinghouse Electric Corp.** C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *EEOC* v. *Commercial Office Products Co.*, *ante*, p. 107. Reported below: 787 F. 2d 943.

No. 87-476. **Equal Employment Opportunity Commission** *v.* **Ocean City Police Department.** C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *EEOC* v. *Commercial Office Products Co., ante,* p. 107. Reported below: 820 F. 2d 1378.

No. 87–761. WCLR RADIO STATION *v.* RENGERS. C. A. 7th Cir. Motion of Chamber of Commerce of the United States et al. for leave to file a brief as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McLaughlin* v. *Richland Shoe Co., ante,* p. 128. Reported below: 825 F. 2d 160.

No. 87–1249. PLITT THEATRES, INC. *v.* COSTON. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McLaughlin* v. *Richland Shoe Co., ante,* p. 128. Reported below: 831 F. 2d 1321.

Miscellaneous Orders

No. – – ——. DWYER *v.* CROCKER NATIONAL BANK ET AL. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. A–851. BATES *v.* TEXAS. Ct. App. Tex., 14th Dist. Application for stay of mandate, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–676. IN RE DISBARMENT OF SERVER. Disbarment entered. [For earlier order herein, see 485 U. S. 952.]

No. D–679. IN RE DISBARMENT OF KOTSOS. Petros A. Kotsos, of Glenview, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on March 21, 1988 [485 U. S. 952], is hereby discharged.

No. D–683. IN RE DISBARMENT OF KERN. Disbarment entered. [For earlier order herein, see 485 U. S. 953.]

No. D–685. IN RE DISBARMENT OF STRAUSS. Disbarment entered. [For earlier order herein, see 485 U. S. 973.]

No. 86–1088. CITY OF CANTON, OHIO *v.* HARRIS ET AL. C. A. 6th Cir. [Certiorari granted, 485 U. S. 933.] Motion of International City Management Association et al. for leave to file a brief as *amici curiae* granted.

No. 87–470. Fort Wayne Books, Inc. *v.* Indiana et al. Sup. Ct. Ind. [Certiorari granted, 485 U. S. 933.] Motions of Video Software Dealers Association and PHE, Inc., for leave to file briefs as *amici curiae* granted.

No. 87–746. Michael H. et al. *v.* Gerald D. Ct. App. Cal., 2d App. Dist. [Probable jurisdiction noted, 485 U. S. 903.] Motions of American Civil Liberties Union Foundation et al. and National Council for Children's Rights, Inc., for leave to file briefs as *amici curiae* granted. Motion of appellant Victoria D. for leave to proceed further herein *in forma pauperis* granted.

No. 87–821. Pittston Coal Group et al. *v.* Sebben et al. C. A. 8th Cir. [Certiorari granted, 484 U. S. 1058];

No. 87–827. McLaughlin, Secretary of Labor, et al. *v.* Sebben et al. C. A. 8th Cir. [Certiorari granted, 484 U. S. 1058]; and

No. 87–1095. Director, Office of Workers' Compensation Programs, United States Department of Labor *v.* Broyles et al. C. A. 4th Cir. [Certiorari granted, 485 U. S. 987.] Motion of respondents for divided argument denied.

No. 87–1818. Badham et al. *v.* Eu, Secretary of State of California, et al. Appeal from D. C. N. D. Cal. Motion of appellants to expedite consideration of jurisdictional statement denied. Justice Stevens would grant this motion.

No. 87–6701. In re Walden. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted or Postponed

No. 86–1856. Northwest Central Pipeline Corp. *v.* State Corporation Commission of Kansas et al. Appeal from Sup. Ct. Kan. Probable jurisdiction noted. Reported below: 240 Kan. 638, 732 P. 2d 775.

No. 87–980. Mississippi Band of Choctaw Indians *v.* Holyfield et al. Appeal from Sup. Ct. Miss. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 511 So. 2d 918.

Certiorari Granted

No. 87–1206. Mesa et al. *v.* California. C. A. 9th Cir. Certiorari granted. Reported below: 813 F. 2d 960.

No. 87-1651. MASSACHUSETTS *v.* OAKES. Sup. Jud. Ct. Mass. Certiorari granted. Reported below: 401 Mass. 602, 518 N. E. 2d 836.

No. 87-1616. GRAHAM ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari granted, case consolidated with No. 87-963, *Hernandez* v. *Commissioner of Internal Revenue* [certiorari granted, 485 U. S. 1005], and a total of one hour allotted for oral argument. JUSTICE BRENNAN and JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 822 F. 2d 844.

Certiorari Denied. (See also No. 87-1650, *supra.*)

No. 86-1944. KWOUN ET AL. *v.* SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 811 F. 2d 401.

No. 87-1111. MATTNER ET UX., DBA MATTNER FARMS *v.* BUENO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 829 F. 2d 1380.

No. 87-1156. GREGG ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 829 F. 2d 1430.

No. 87-1256. HYDROGEN TECHNOLOGY CORP. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 831 F. 2d 1155.

No. 87-1292. JEDLICKA *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied.

No. 87-1314. RUSSO *v.* UNITED STATES;
No. 87-1323. PERSICO *v.* UNITED STATES;
No. 87-1324. PERSICO ET AL. *v.* UNITED STATES;
No. 87-1553. CATALDO *v.* UNITED STATES; and
No. 87-6597. MCINTOSH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 832 F. 2d 705.

No. 87-1575. ORION CORP. *v.* WASHINGTON ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 109 Wash. 2d 621, 747 P. 2d 1062.

No. 87-1627. NASH ET AL. *v.* HOUSTON CIVIC CENTER. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 1431.

No. 87-1628. SMITH ET AL. *v.* MICHIGAN DEPARTMENT OF TREASURY ET AL. Ct. App. Mich. Certiorari denied. Reported below: 163 Mich. App. 179, 414 N. W. 2d 374.

No. 87-1634. PHOTOTRON CORP. *v.* EASTMAN KODAK CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 842 F. 2d 95.

No. 87-1635. ALVAREZ, FOR USE AND BENEFIT OF AMERICAN HOME INSURANCE CO. *v.* MERRILL STEVENS DRY DOCK CO. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 510 So. 2d 931.

No. 87-1636. RICHMOND NEWSPAPERS, INC., ET AL. *v.* LIPSCOMB. Sup. Ct. Va. Certiorari denied. Reported below: 234 Va. 277, 362 S. E. 2d 32.

No. 87-1637. ZANT, WARDEN *v.* CORN. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1474.

No. 87-1641. SCOTT *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 185 Ga. App. 568, 365 S. E. 2d 127.

No. 87-1644. CONTINENTAL ELECTRIC CO. ET AL. *v.* AMERICAN EMPLOYERS' INSURANCE CO. Sup. Ct. Ala. Certiorari denied. Reported below: 518 So. 2d 83.

No. 87-1659. FARMERS & MERCHANTS BANK *v.* FORMBY. C. A. 11th Cir. Certiorari denied. Reported below: 832 F. 2d 1266.

No. 87-1678. JOHNSON, WARDEN *v.* DEMOS. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 840.

No. 87-1689. CHANDLER *v.* CHANDLER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 834 F. 2d 1022.

No. 87-1749. HAMPTON *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 87-1766. JARAMILLO-MONTOYA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 834 F. 2d 276.

No. 87-5946. JOHNSON *v.* ARTIM TRANSPORTATION SYSTEM, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 826 F. 2d 538.

No. 87-6151. COBB *v.* MCMACKIN, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 832 F. 2d 342.

No. 87-6490. FABBRI *v.* SHERATON PLAZA LA REINA HOTEL. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 302.

No. 87-6521. QUALMAN *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 304.

No. 87-6575. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 839 F. 2d 1041.

No. 87-6628. DIEHL *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 87-6688. MAGGARD *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 2d 1219.

No. 87-6689. SINDRAM *v.* W & W ASSOCIATES, INC. Ct. App. Md. Certiorari denied. Reported below: 311 Md. 324, 534 A. 2d 991.

No. 87-6695. YATES *v.* TRAUGHBER, COMMISSIONER, TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL. Ct. App. Tenn. Certiorari denied. Reported below: 747 S. W. 2d 338.

No. 87-6705. SAAHIR *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 837 F. 2d 1088.

No. 87-6707. CRIM *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied.

No. 87-6708. HEARD *v.* SIKES ET AL. C. A. 11th Cir. Certiorari denied.

No. 87-6709. KORTZEBORN *v.* VYLON MANAGEMENT CORP. ET AL. Sup. Ct. Cal. Certiorari denied.

No. 87-6715. SELTZER *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 833 F. 2d 975.

No. 87–6718. Abdullah *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 294 Ark. 547, 744 S. W. 2d 727.

No. 87–6719. Cooper *v.* City of Ocala, Florida, et al. C. A. 11th Cir. Certiorari denied.

No. 87–6720. Gardner *v.* Missouri. Sup. Ct. Mo. Certiorari denied. Reported below: 741 S. W. 2d 1.

No. 87–6721. Mudd et al. *v.* Moore, Director, Missouri Department of Corrections and Human Resources, et al. Sup. Ct. Mo. Certiorari denied.

No. 87–6733. Grays *v.* Hughes et al. C. A. 6th Cir. Certiorari denied. Reported below: 841 F. 2d 1126.

No. 87–6742. Powell *v.* Illinois. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 160 Ill. App. 3d 689, 513 N. E. 2d 1162.

No. 87–6743. Sailor *v.* Scully, Superintendent, Green Haven Correctional Facility, et al. C. A. 2d Cir. Certiorari denied. Reported below: 836 F. 2d 118.

No. 87–6755. Dorsey *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 819 F. 2d 1055.

No. 87–6764. Ayala *v.* Texas. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 87–6773. Shariff *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 33.

No. 87–6775. Noll *v.* Kimmel et al. C. A. 8th Cir. Certiorari denied.

No. 87–6777. Parker *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 836 F. 2d 1080.

No. 87–6783. Quintero-Rodriquez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1093.

No. 87–6786. Jordan *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 268 U. S. App. D. C. 145, 839 F. 2d 824.

No. 87–6802. Long *v.* Maryland. C. A. 4th Cir. Certiorari denied. Reported below: 840 F. 2d 11.

No. 87-6803. CASTANEDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 835 F. 2d 1434.

No. 87-6804. LAWRENCE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 2d 1219.

No. 87-6805. ALVAREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1024.

No. 87-6806. MCCANN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 835 F. 2d 1184.

No. 87-6819. MOSQUERA HERRERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1024.

No. 87-6821. MOON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 1210.

No. 87-6859. RIDDICK *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 134 App. Div. 2d 969, 520 N. Y. S. 2d 890.

No. 87-600. VARIABLE ANNUITY LIFE INSURANCE CO. ET AL. *v.* OTTO. C. A. 7th Cir. Motions of National Association of Life Companies, National Association of Insurance Commissioners, American Council of Life Insurance, Association of California Life Insurance Companies, and National Organization of Life and Health Insurance Guaranty Associations for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 814 F. 2d 1127.

No. 87-1458. ANDERSON ET AL. *v.* UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 827 F. 2d 1564.

No. 87-1626. ALEXANDER RANCH, INC., ET AL. *v.* CENTRAL APPRAISAL DISTRICT OF ERATH COUNTY, TEXAS, ET AL. Ct. App. Tex., 11th Dist. Motion of Texas for leave to intervene granted. Certiorari denied. Reported below: 733 S. W. 2d 303.

No. 87-1671. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* JACKSON. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 837 F. 2d 1469.

No. 87–6096. Kyles *v.* Louisiana. Sup. Ct. La.; and

No. 87–6602. Gates *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: No. 87–6096, 513 So. 2d 265; No. 87–6602, 43 Cal. 3d 1168, 743 P. 2d 301.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 87–1471. Franklin *v.* Office of Personnel Management, 485 U. S. 984;

No. 87–6113. Booker *v.* Mississippi, 485 U. S. 982;

No. 87–6195. Cazares *v.* Refugia Sandoval, 485 U. S. 908; and

No. 87–6532. Fields *v.* Harrison et al., 485 U. S. 1013. Petitions for rehearing denied.

No. 87–6274. Loftis *v.* Leeke, Commissioner, South Carolina Department of Corrections, et al., 485 U. S. 966. Motion for leave to file petition for rehearing denied.

No. 87–6525. Cordeiro *v.* Conner et al., 485 U. S. 1013. Petition for rehearing denied. Justice O'Connor took no part in the consideration or decision of this petition.

May 24, 1988

Dismissal Under Rule 53

No. 87–1664. Stream et al. *v.* Auster Oil & Gas, Inc. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 835 F. 2d 597.

May 31, 1988

Appeals Dismissed

No. 85–1429. American General Life & Accident Insurance Co. *v.* Miller et vir. Appeal from Sup. Ct. Miss. dismissed for want of substantial federal question. Justice O'Connor, Justice Scalia, and Justice Kennedy would dismiss the appeal with respect to Question 1 for want of a substantial federal question; with respect to Question 2, they would dismiss the appeal for want of a properly presented federal question. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 484 So. 2d 329.

No. 85–1799. TREADWELL FORD, INC. *v.* CAMPBELL ET AL. Appeal from Sup. Ct. Ala. dismissed for want of substantial federal question. JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE KENNEDY would dismiss the appeal with respect to Question 1 for want of a substantial federal question; with respect to Question 2, they would dismiss the appeal for want of a properly presented federal question. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 485 So. 2d 312.

No. 86–107. MOBILE DODGE, INC. *v.* ALFORD. Appeal from Sup. Ct. Ala. dismissed for want of substantial federal question. JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE KENNEDY would dismiss the appeal with respect to Question 1 for want of a substantial federal question; with respect to Question 2, they would dismiss the appeal for want of a properly presented federal question. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 487 So. 2d 866.

No. 87–294. ALABAMA POWER CO. *v.* CANTRELL. Appeal from Sup. Ct. Ala. dismissed for want of substantial federal question. Reported below: 507 So. 2d 1295.

No. 87–1361. DIAMOND ET AL. *v.* CUOMO, GOVERNOR OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 70 N. Y. 2d 338, 514 N. E. 2d 1356.

No. 87–1595. HALLORAN *v.* NEW YORK. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question. Reported below: 135 App. Div. 2d 365, 521 N. Y. S. 2d 962.

No. 87–1658. CAGLE *v.* COLORADO. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. Reported below: 751 P. 2d 614.

No. 87–1670. DURJAK *v.* ILLINOIS. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 158 Ill. App. 3d 1100, 525 N. E. 2d 599.

No. 87–6741. TROMBLEY *v.* VERMONT. Appeal from Sup. Ct. Vt. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 148 Vt. 293, 532 A. 2d 963.

No. 87–6812. RICHARDSON *v.* ARNOLD ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 837 F. 2d 476.

No. 87–1699. ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF ELLIOTT, A MINOR *v.* LEWIN ET AL. Appeal from Sup. Ct. Tex. Motion of appellee Hillcrest Baptist Hospital for damages and double costs denied. Motion of appellee Marcial Lewin for damages and double costs denied. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87–6613. SWIFT *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. Appeal from Sup. Ct. Ariz. dismissed for want of properly presented federal question.

Certiorari Granted—Vacated and Remanded

No. 86–6550. DURNS ET AL. *v.* BUREAU OF PRISONS ET AL. C. A. D. C. Cir. Motion of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States Dept. of Justice* v. *Julian*, *ante*, p. 1. JUSTICE SCALIA took no part in the consideration or decision of this case. Reported below: 256 U. S. App. D. C. 156, 804 F. 2d 701.

Miscellaneous Orders

No. — — ——. JONES *v.* ALABAMA. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by the petitioner granted.

No. A–892 (87–7052). FLEMING *v.* ZANT, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR would deny the application for stay.

No. D-681. IN RE DISBARMENT OF FELDMAN. Disbarment entered. [For earlier order herein, see 485 U. S. 952.]

No. D-690. IN RE DISBARMENT OF DORSEY. Disbarment entered. [For earlier order herein, see 485 U. S. 974.]

No. D-709. IN RE DISBARMENT OF KANTOR. It is ordered that Robert J. Kantor, of Asbury Park, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-710. IN RE DISBARMENT OF FORD. It is ordered that Terrence J. Ford, of Santa Rosa, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-711. IN RE DISBARMENT OF HARPER. It is ordered that Harvey William Harper, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-712. IN RE DISBARMENT OF BRILL. It is ordered that Abraham J. Brill, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 111, Orig. DELAWARE *v.* NEW YORK. Motion for leave to file bill of complaint granted. Defendant allowed 60 days in which to file an answer. Motion for temporary restraining order denied.

No. 86-422. CARPENTER ET AL. *v.* UNITED STATES, 484 U. S. 19. Motion of petitioner Carpenter for leave to proceed *in forma pauperis nunc pro tunc* denied. Motion of petitioner Carpenter for appointment of counsel *nunc pro tunc* denied. JUSTICE KENNEDY took no part in the consideration or decision of these motions.

No. 87-470. FORT WAYNE BOOKS, INC. *v.* INDIANA ET AL. Sup. Ct. Ind. [Certiorari granted, 485 U. S. 933]; and

No. 87-614. SAPPENFIELD ET AL. *v.* INDIANA. Ct. App. Ind. [Certiorari granted, 485 U. S. 933.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* in No. 87-470 granted. Motions of Spartacist League et al. and American Booksellers Association et al. for leave to file briefs as *amici curiae* granted.

No. 87-826. GOLDBERG ET AL. *v.* SWEET, DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE, ET AL.; and

No. 87-1101. GTE SPRINT COMMUNICATIONS CORP. *v.* SWEET, DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE, ET AL. Sup. Ct. Ill. [Probable jurisdiction noted, 484 U. S. 1057.] Motion of appellant GTE Sprint Communications Corp. for divided argument denied.

No. 87-996. COIT INDEPENDENCE JOINT VENTURE *v.* FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER OF FIRSTSOUTH, F. A. C. A. 5th Cir. [Certiorari granted, 485 U. S. 933.] Motion of Joseph M. Hudspeth for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied. Motion of United States League of Savings Institutions for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument is denied.

No. 87-1888. PITTSBURGH & LAKE ERIE RAILROAD CO. *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL. C. A. 3d Cir. Motion of petitioner to expedite consideration of the petition for certiorari denied.

No. 87-6827. IN RE DOWNS. Petition for writ of habeas corpus denied.

Certiorari Denied. (See also Nos. 87-1670, 87-6741, 87-6812, and 87-1699, *supra.*)

No. 86-1569. ALUMINUM COMPANY OF AMERICA *v.* SLIMAN ET UX. Sup. Ct. Idaho. Certiorari denied. Reported below: 112 Idaho 277, 731 P. 2d 1267.

No. 87–205. ALASKA MINERS ASSN. *v.* TRUSTEES FOR ALASKA ET AL.;

No. 87–206. ALASKA *v.* TRUSTEES FOR ALASKA ET AL.; and

No. 87–371. TRUSTEES FOR ALASKA ET AL. *v.* ALASKA ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 736 P. 2d 324.

No. 87–1021. PLAYTEX HOLDINGS, INC. *v.* O'GILVIE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 821 F. 2d 1438.

No. 87–1312. PAWNEE ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 830 F. 2d 187.

No. 87–1465. PICCOLO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 835 F. 2d 517.

No. 87–1487. OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 87–1506. CORPORATION FOR PUBLIC BROADCASTING ET AL. *v.* CENTURY COMMUNICATIONS CORP. ET AL.;

No. 87–1510. NATIONAL ASSOCIATION OF BROADCASTERS *v.* CENTURY COMMUNICATIONS CORP. ET AL.; and

No. 87–1551. ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC. *v.* CENTURY COMMUNICATIONS CORP. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 266 U. S. App. D. C. 228, 835 F. 2d 292, and 267 U. S. App. D. C. 94, 837 F. 2d 517.

No. 87–1493. LAFAURIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 833 F. 2d 1468.

No. 87–1507. YASHON *v.* HUNT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 825 F. 2d 1016.

No. 87–1535. JOHN HANCOCK VARIABLE LIFE INSURANCE CO. *v.* PIERCE. Sup. Ct. Ala. Certiorari denied. Reported below: 530 So. 2d 719.

No. 87–1572. BENACQUISTA, POLSINELLI & SERAFINI MANAGEMENT CORP. *v.* SAVE THE PINE BUSH, INC., ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 130 App. Div. 2d 1, 518 N. Y. S. 2d 466.

No. 87-1576. UPADHYA *v.* LANGENBERG ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 834 F. 2d 661.

No. 87-1618. LEWICKI *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 26 M. J. 63.

No. 87-1652. ADAM *v.* KERR-MCGEE CHEMICAL CORP. C. A. 5th Cir. Certiorari denied. Reported below: 840 F. 2d 14.

No. 87-1655. BOBB ET AL. *v.* OSTLUND. C. A. 9th Cir. Certiorari denied. Reported below: 825 F. 2d 1371.

No. 87-1665. MCCARTY RANCH TRUST ET AL. *v.* CRAIG, TRUSTEE OF CASSIDY LAND & CATTLE CO., INC. C. A. 8th Cir. Certiorari denied. Reported below: 836 F. 2d 1130.

No. 87-1666. ARRIAGA-ZAYAS ET AL. *v.* INTERNATIONAL LADIES GARMENT WORKERS' UNION, PUERTO RICO COUNCIL LOCAL 600-601, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 835 F. 2d 11.

No. 87-1672. LEE SECK MON ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (GUESS?, INC., ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87-1680. MILLS ET AL. *v.* FRANCO FOOD EQUIPMENT, INC., ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 429 Mich. 875, 414 N. W. 2d 888.

No. 87-1682. CHRYSLER WORKERS ASSN. ET AL. *v.* CHRYSLER CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 834 F. 2d 573.

No. 87-1683. JABE, WARDEN *v.* ALEXANDER. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 140.

No. 87-1695. GREAT LAKES DREDGE & DOCK CO. *v.* CHEVRON TRANSPORT CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 832 F. 2d 1540.

No. 87-1741. CORBELL ET AL. *v.* STEVENS. C. A. 5th Cir. Certiorari denied. Reported below: 832 F. 2d 884.

No. 87-1806. MAIRONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 85.

No. 87–6235. Creel *v.* Pfeiffer. C. A. 5th Cir. Certiorari denied. Reported below: 834 F. 2d 1023.

No. 87–6453. Economou et ux. *v.* Securities and Exchange Commission. C. A. 2d Cir. Certiorari denied. Reported below: 829 F. 2d 341.

No. 87–6491. Pavlico *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 548.

No. 87–6581. Lopez Andino *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 831 F. 2d 1164.

No. 87–6633. Hernandez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 840 F. 2d 23.

No. 87–6643. Jones *v.* Secretary of Treasury. C. A. 9th Cir. Certiorari denied. Reported below: 840 F. 2d 21.

No. 87–6650. Watson *v.* Jarvis, Sheriff, DeKalb County, Georgia. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1093.

No. 87–6697. Causey *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 834 F. 2d 1277.

No. 87–6738. Hyde *v.* Hyde. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 518 So. 2d 1283.

No. 87–6761. Lariscey *v.* United States et al. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1094.

No. 87–6766. Shanahan *v.* Missouri. Sup. Ct. Mo. Certiorari denied.

No. 87–6767. Rolling *v.* Clarke, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 1028.

No. 87–6769. Creel *v.* Lynaugh, Director, Texas Department of Corrections. Ct. Crim. App. Tex. Certiorari denied.

No. 87–6770. Olson et al. *v.* Chanute Production Credit Assn. C. A. 10th Cir. Certiorari denied.

No. 87–6810. Madson *v.* Colorado. Ct. App. Colo. Certiorari denied.

No. 87–6818. MATT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 838 F. 2d 1356.

No. 87–6822. REID *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 136 App. Div. 2d 578, 523 N. Y. S. 2d 178.

No. 87–6825. VIDAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 842 F. 2d 333.

No. 87–6829. BOLDIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 834 F. 2d 1026.

No. 87–6831. LEVY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 833 F. 2d 1009.

No. 87–6832. AGYEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 842 F. 2d 203.

No. 87–6835. BONTEMPO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 840 F. 2d 18.

No. 87–6842. FULTS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87–6844. HOLZER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 840 F. 2d 1343.

No. 87–6849. GARNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 837 F. 2d 1404.

No. 87–6852. SEBETICH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 841 F. 2d 1120.

No. 87–6854. MESA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 838 F. 2d 743.

No. 87–6862. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 841 F. 2d 1120.

No. 87–6865. RADABAUGH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 840 F. 2d 18.

No. 87–6904. BOUDETTE *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 87–6907. ABDRABBOH *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 87-159. OHIO CASUALTY INSURANCE CO. *v.* DOWNEY SAVINGS & LOAN ASSN. Ct. App. Cal., 2d App. Dist. Certiorari denied. JUSTICE O'CONNOR and JUSTICE KENNEDY would grant certiorari. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835.

No. 87-1150. BARRY, MAYOR OF THE DISTRICT OF COLUMBIA, ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Motion of Lawyers' Committee for Civil Rights Under Law et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 259 U. S. App. D. C. 50, 813 F. 2d 412, and 264 U. S. App. D. C. 1, 826 F. 2d 73.

No. 87-1196. ATLANTIC RICHFIELD CO. *v.* NIELSEN. Ct. App. Cal., 4th App. Dist. Certiorari denied. JUSTICE O'CONNOR and JUSTICE KENNEDY would grant certiorari.

No. 87-1518. FLORIDA *v.* MORGAN. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 515 So. 2d 975.

No. 87-1520. WILEY *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 87-6472. BANKS *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 87-6686. BELL *v.* ALABAMA. Ct. Crim. App. Ala.;
No. 87-6744. MUSGROVE *v.* ALABAMA. Sup. Ct. Ala.; and
No. 87-6758. COLLIER *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: No. 87-1520, 517 So. 2d 1373; No. 87-6686, 518 So. 2d 840; No. 87-6744, 519 So. 2d 586; No. 87-6758, 103 Nev. 563, 747 P. 2d 225.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 87-6422. LEWIS *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 509 So. 2d 1236.

JUSTICE WHITE, dissenting.

Petitioner was convicted of robbery and attempted first-degree murder, charges that stemmed from the robbery of a gas-station attendant. At trial, he sought to suppress statements he had made while in custody, claiming that his *Miranda* rights were violated. The pertinent facts are that petitioner, once in custody, was given *Miranda* warnings and immediately invoked his right to remain silent. The police did not try to question him, but instead took him to a room where he was shown a videotape of the robbery, which also included footage of the shooting of the attendant. While viewing the videotape, petitioner made several incriminating statements to an officer. The state trial court denied petitioner's motion to suppress the statements, and its decision was affirmed on appeal. 509 So. 2d 1236 (Fla. App. 1987). Petitioner argued that being confronted with evidence of this nature is the "functional equivalent" of express questioning, which is impermissible once a person in custody has invoked his right to remain silent, but the Florida Court of Appeal disagreed.

We have stated that "interrogation" under *Miranda* does include conditions that are its "functional equivalent," that is, "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Rhode Island* v. *Innis*, 446 U. S. 291, 301 (1980) (footnotes omitted). We also have observed that a "psychological ploy" of any significance would also be treated as the "functional equivalent" of interrogation. *Arizona* v. *Mauro*, 481 U. S. 520, 526 (1987).

Whether police may confront a suspect with evidence against him, outside the range of normal arrest and charging procedures, without engaging in the "functional equivalent" of interrogation is a substantial question in light of *Innis*. In addition, the federal and state courts disagree over the issue. Some courts, for example, have found an interrogation to have occurred when the police, in booking a suspect, merely advised him of the charges and then described the evidence against him in some detail. *Wainwright* v. *State*, 504 A. 2d 1096, 1102–1103 (Del. 1986); *Koza* v. *State*, 102 Nev. 181, 183–188, 718 P. 2d 671, 673–676 (1986); *State* v. *Quinn*, 64 Md. App. 668, 671–674, 498 A. 2d 676, 677–679 (1985). Other courts have held to the contrary. *United States* v. *Pheaster*, 544 F. 2d 353, 366–368 (CA9 1976); *United States* v. *Hodge*, 487 F. 2d 945, 946–947 (CA5 1973). On the other side of the issue, moreover, some courts have treated more adventurous police practices, which are in no sense any part of the formal arrest or charging procedures, as the "functional equivalent" of interrogation. In *People* v. *Ferro*, 63 N. Y. 2d 316, 472 N. E. 2d 13 (1984), for example, a *Miranda* violation was found where the police took furs allegedly stolen by the suspect and spread them out, without a word, in front of the suspect's cell for him to ponder. See also *Bryant* v. *State*, 49 Md. App. 272, 431 A. 2d 714 (1981), cert. denied, 456 U. S. 949 (1982). The decision below in this case is to the contrary. I would grant certiorari to consider the construction of *Innis* rendered by the court below and to resolve the significant disagreement on this general issue among the state and federal courts, which has led those courts both to handicap the police in pursuing some apparently legitimate law enforcement practices and to approve the use of other ploys that have nothing to do with the usual and accepted procedures for arresting and charging a suspect.

No. 87-6746. MIRANDA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 44 Cal. 3d 57, 744 P. 2d 1127.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231-241 (1976) (MARSHALL, J., dissenting), I would grant the petition for writ of certiorari. But even if I did not hold this view, I would grant the petition because it raises the question whether the State may introduce evidence of unadjudicated criminal conduct at the sentencing phase of a capital trial.

A jury convicted petitioner Adam Miranda of first-degree murder and assault with intent to commit murder. At the sentencing phase of the trial, the only evidence the State introduced to support the death penalty concerned a wholly unrelated murder. Petitioner had been charged with committing this murder, but had not been tried for or convicted of the crime. Moreover, the trial court refused to instruct the jury that it could consider the evidence of the unrelated murder in making a sentencing determination only if it found beyond a reasonable doubt that petitioner had committed the offense. The jury imposed the death sentence.

I have stated twice this Term that the Court should consider the question whether the admission of evidence of unadjudicated criminal conduct at the penalty phase of a capital trial violates the Eighth and Fourteenth Amendments. See *Williams* v. *Lynaugh*, 484 U. S. 935 (1987) (dissenting from denial of certiorari); *Devier* v. *Kemp*, 484 U. S. 948 (1987) (dissenting from denial of certiorari). I have noted that this question has prompted a number of conflicting decisions nationwide. Compare *State* v. *Bobo*, 727 S. W. 2d 945, 952–953 (Tenn.) (unadjudicated-crimes evidence not admissible), cert. denied, 484 U. S. 872 (1987), and *State* v. *Bartholomew*, 101 Wash. 2d 631, 640–642, 683 P. 2d 1079, 1085–1086 (1984) (en banc) (same), with *Milton* v. *State*, 599 S. W. 2d 824, 827 (Tex. Crim. App. 1980) (en banc) (unadjudicated-crimes evidence admissible). In addition, I have argued that the admission of unadjudicated-crimes evidence at the sentencing phase of a capital trial is difficult to reconcile with the unique constitutional concern for reliability in death sentencing proceedings. This case again demonstrates that the Court should resolve this important question.

No. 87–6752. GAUNCE *v.* UNITED STATES; GAUNCE *v.* DEVINCENTIS ET AL.; and GAUNCE *v.* NATIONAL TRANSPORTATION SAFETY BOARD ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 779 F. 2d 1434 (first case); 782 F. 2d 1052 (second case); 732 F. 2d 163 (third case).

Rehearing Denied

No. 87–1139. GAGLIARDI *v.* ZIEGLER ET AL., 485 U. S. 987;

No. 87–1351. UBEROI *v.* UNIVERSITY OF COLORADO ET AL., 485 U. S. 988;

No. 87–6282. GRAVATT *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, 485 U. S. 1010;

No. 87–6449. MCGOVERN *v.* MEKO, 485 U. S. 1011;

No. 87–6464. LAWRENCE *v.* UNITED STATES ARMY TANK-AUTOMOTIVE COMMAND ET AL., 485 U. S. 1022;

No. 87–6595. HERNANDEZ *v.* UNITED STATES, 485 U. S. 1013; and

No. 87–6666. LAURENCO *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, 485 U. S. 1014. Petitions for rehearing denied.

No. 87-6388. WHITTINGTON *v.* CUNNAGIN, LAUREL COUNTY ATTORNEY, ON BEHALF OF ENGLERT, ET AL., 485 U. S. 979. Motion of petitioner for leave to file petition for rehearing out of time denied.

JUNE 6, 1988

Appeals Dismissed

No. 87-1629. NATIONAL CAN CORP. ET AL. *v.* WASHINGTON DEPARTMENT OF REVENUE; and

No. 87-1767. TYLER PIPE INDUSTRIES, INC. *v.* WASHINGTON DEPARTMENT OF REVENUE. Appeals from Sup. Ct. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari denied. JUSTICE WHITE, JUSTICE STEVENS, and JUSTICE SCALIA would note probable jurisdiction and set cases for oral argument. Reported below: 109 Wash. 2d 878, 749 P. 2d 1286.

No. 87-1708. TIERNEY ET AL. *v.* PLANNED INDUSTRIAL EXPANSION AUTHORITY OF KANSAS CITY, MISSOURI, ET AL. Appeal from Sup. Ct. Mo. dismissed for want of properly presented federal question. Reported below: 742 S. W. 2d 146.

No. 87-1811. VOINCHE *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 840 F. 2d 13.

No. 87-6725. MULLIS *v.* UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEVADA ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 828 F. 2d 1385.

No. 87-1840. SOLYOM ET AL. *v.* MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION ET AL. Appeal from Ct. Sp. App. Md. dismissed for want of substantial federal question. Reported below: 71 Md. App. 741.

Miscellaneous Orders

No. D-667. IN RE DISBARMENT OF SMITH. Disbarment entered. [For earlier order herein, see 485 U. S. 951.]

No. D-682. In re Disbarment of Briscoe. Disbarment entered. [For earlier order herein, see 485 U. S. 953.]

No. D-688. In re Disbarment of Magedman. Disbarment entered. [For earlier order herein, see 485 U. S. 974.]

No. D-695. In re Disbarment of Baltimore. Disbarment entered. [For earlier order herein, see 485 U. S. 985.]

No. D-713. In re Disbarment of Foote. It is ordered that Harry Lanier Beach Foote, of Jackson, Miss., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 87-6431. Schmuck *v.* United States. C. A. 7th Cir. [Certiorari granted, *ante*, p. 1004.] Motion for appointment of counsel granted, and it is ordered that Peter L. Steinberg, Esq., of Madison, Wis., be appointed to serve as counsel for petitioner in this case.

No. 87-6704. Wrenn *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 27, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of certiorari in compliance with Rule 33 of the Rules of this Court.

Justice Brennan, Justice Marshall, and Justice Stevens, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 87-6772. In re Alexander. C. A. 8th Cir. Petition for writ of common-law certiorari denied. Reported below: 667 F. 2d 556.

No. 87-6790. In re Martin. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 87-636. Karahalios *v.* National Federation of Federal Employees, Local 1263. C. A. 9th Cir. Certiorari granted. Reported below: 821 F. 2d 1389.

No. 87-1201. OSTERNECK ET AL. *v.* ERNST & WHINNEY. C. A. 11th Cir. Certiorari granted. Reported below: 825 F. 2d 1521.

No. 87-1295. UNITED STATES *v.* SOKOLOW. C. A. 9th Cir. Certiorari granted. Reported below: 831 F. 2d 1413.

No. 87-1555. BURNLEY, SECRETARY OF TRANSPORTATION, ET AL. *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL. C. A. 9th Cir. Motion of Thomas Colley et al. for leave to file a brief as *amici curiae* granted. Certiorari granted and case set for oral argument in tandem with No. 86-1879, *National Treasury Employees Union et al.* v. *Von Raab, Commissioner, United States Customs Service* [certiorari granted, 485 U. S. 903]. Reported below: 839 F. 2d 575.

Certiorari Denied. (See also Nos. 87-1629, 87-1767, 87-1811, 87-6725, and 87-6772, *supra.*)

No. 86-757. OLYMPUS CORP. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 792 F. 2d 315.

No. 87-969. IMPEMBA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 825 F. 2d 538.

No. 87-1338. MILLWOOD *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 72 Md. App. 82, 527 A. 2d 803.

No. 87-1514. ARMCO INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 87-1719. UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 832 F. 2d 357.

No. 87-1515. MAINE CENTRAL RAILROAD CO. ET AL. *v.* BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 835 F. 2d 368.

No. 87-1533. DAUGHERTY ET AL. *v.* AT&T TECHNOLOGIES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 832 F. 2d 1262.

No. 87-1546. MELCHER, UNITED STATES SENATOR *v.* FEDERAL OPEN MARKET COMMITTEE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 266 U. S. App. D. C. 397, 836 F. 2d 561.

No. 87–1548. PREWITT *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 87–1578. SODOWSKI *v.* NATIONAL FLOOD INSURANCE PROGRAM OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY. C. A. 7th Cir. Certiorari denied. Reported below: 834 F. 2d 653.

No. 87–1591. FRASER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 834 F. 2d 911.

No. 87–1610. JACK DYKSTRA FORD, INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 6th Cir. Certiorari denied.

No. 87–1674. BENEVENTO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 836 F. 2d 60.

No. 87–1675. SCHERER *v.* BALKEMA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 840 F. 2d 437.

No. 87–1684. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* ESTATE OF WESSON, BY HALL, ADMINISTRATRIX AND AS GUARDIAN OF WESSON ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 517 So. 2d 521.

No. 87–1688. OWEN ET UX. *v.* CITY OF SPRINGFIELD, MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 741 S. W. 2d 16.

No. 87–1696. TOYOTA OF BERKELEY *v.* AUTOMOBILE SALESMEN'S UNION, LOCAL 1095, UNITED FOOD & COMMERCIAL WORKERS UNION. C. A. 9th Cir. Certiorari denied. Reported below: 834 F. 2d 751.

No. 87–1700. CAPRIOLA ET UX. *v.* B. F. GOODRICH CO. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 459.

No. 87–1709. TEUBNER ET UX. *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 742 S. W. 2d 57.

No. 87–1713. RUTLEDGE *v.* MARMAC SYSTEMS ENGINEERING. C. A. 9th Cir. Certiorari denied. Reported below: 838 F. 2d 474.

No. 87-1714. ELMENDORF *v.* SHALER AREA SCHOOL DISTRICT. Pa. Commw. Ct. Certiorari denied.

No. 87-1723. ENGLISH *v.* PABST BREWING CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 828 F. 2d 1047.

No. 87-1730. APONTE ROQUE, SECRETARY OF DEPARTMENT OF EDUCATION OF PUERTO RICO *v.* KERCADO-MELENDEZ. C. A. 1st Cir. Certiorari denied. Reported below: 829 F. 2d 255.

No. 87-1744. PHILLIPS *v.* CITY OF MARTINEZ, CALIFORNIA, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 87-1770. DAMASCUS *v.* BORGIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 823 F. 2d 554.

No. 87-1820. HYSLEP ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 833 F. 2d 1019.

No. 87-1831. COOK COUNTY COLLEGE TEACHERS UNION LOCAL 1600, AFT, AFL-CIO *v.* CITY COLLEGES OF CHICAGO, BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT #508, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 837 F. 2d 314.

No. 87-6450. MARRA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 305.

No. 87-6489. HOWARD *v.* CITY OF FORT MYERS, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1069.

No. 87-6574. GIPSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 835 F. 2d 1323.

No. 87-6580. HOMA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87-6609. RHODES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87-6612. WILLIAMS *v.* YORK STEAK HOUSE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 87-6617. TASBY, AKA AMEN-RA *v.* LEE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 1431.

No. 87-6726. Blyden *v.* Government of the Virgin Islands. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 1206.

No. 87-6749. Manning *v.* United States. Ct. App. D. C. Certiorari denied.

No. 87-6759. Graves *v.* Brown. C. A. 8th Cir. Certiorari denied. Reported below: 837 F. 2d 478.

No. 87-6762. Gribble *v.* Ohio et al. Ct. App. Ohio, Tuscarawas County. Certiorari denied.

No. 87-6771. Olsen *v.* Village of Fox Lake et al. C. A. 7th Cir. Certiorari denied.

No. 87-6784. Simdram *v.* Maryland. Cir. Ct. Frederick County, Md. Certiorari denied.

No. 87-6788. Thibeaux *v.* Texas. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 87-6792. Ziegler *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1093.

No. 87-6795. Czemarmaczowicz *v.* Cowles Tool Co. C. A. 6th Cir. Certiorari denied. Reported below: 837 F. 2d 475.

No. 87-6798. Hewlett *v.* Owens et al. C. A. 3d Cir. Certiorari denied.

No. 87-6799. Lemons *v.* Clary, Sheriff of Fort Bend County, et al. C. A. 5th Cir. Certiorari denied. Reported below: 841 F. 2d 394.

No. 87-6801. Dawns *v.* Canon U. S. A., Inc. C. A. 5th Cir. Certiorari denied. Reported below: 833 F. 2d 1008.

No. 87-6816. May *v.* Pro-Guard, Inc. C. A. 6th Cir. Certiorari denied. Reported below: 837 F. 2d 476.

No. 87-6843. Johnson *v.* Bowen, Secretary of Health and Human Services. C. A. 11th Cir. Certiorari denied. Reported below: 840 F. 2d 23.

No. 87-6874. Gibson *v.* United States. Ct. App. D. C. Certiorari denied.

No. 87-6888. MARTINEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 842 F. 2d 1288.

No. 87-6889. MUSTACCHIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 1208.

No. 87-6891. FREE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 841 F. 2d 321.

No. 87-6901. SWYTZER *v.* UNITED STATES POSTAL SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 1215.

No. 87-6906. BLANCO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 844 F. 2d 344.

No. 87-6911. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 842 F. 2d 328.

No. 87-6913. TOMPKINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1019.

No. 87-6914. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 842 F. 2d 328.

No. 87-6915. BAYNARD *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 465.

No. 87-6925. ALSTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 264 U. S. App. D. C. 406, 829 F. 2d 191.

No. 87-6929. RAMSEY *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 744 S. W. 2d 418.

No. 87-1325. CARRUTHERS, GOVERNOR OF NEW MEXICO, ET AL. *v.* DURAN ET AL. C. A. 10th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 87-1839. DOE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioners for leave to file appendix to petition under seal granted. Certiorari denied. Reported below: 841 F. 2d 1116.

No. 87-6233. JAMES *v.* BUTLER, WARDEN. C. A. 5th Cir.;
No. 87-6869. JOHNS *v.* MISSOURI. Ct. App. Mo., Eastern Dist.; and

No. 87-6905. FOSTER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: No. 87-6233, 827 F. 2d 1006; No. 87-6869, 741 S. W. 2d 771; No. 87-6905, 119 Ill. 2d 69, 518 N. E. 2d 82.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 87-6763. FOGGY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 121 Ill. 2d 337, 521 N. E. 2d 86.

No. 87-6817. WILLIAMS *v.* PLANNED PARENTHOOD FEDERATION OF AMERICA ET AL. C. A. 10th Cir. Certiorari before judgment denied.

No. 87-6926. JOHNSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 119 Ill. 2d 119, 518 N. E. 2d 100.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari. But even if I did not hold this view, I would grant the petition to decide whether the Illinois capital sentencing scheme, under which petitioner was sentenced to death, is constitutionally invalid.

The Illinois Death Penalty Act provides that once a sentencer finds that a statutorily defined aggravating factor exists, the sentencer proceeds to consider the range of statutory and mitigating factors. "If the Court determines that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the Court shall sentence the defendant to death." Ill. Rev.

Stat., ch 38, ¶9–1(h) (1987). As I have stated on previous occasions, this language appears to place on the defendant the burden of proving that the death penalty is not appropriate in his particular case. See *Gacy* v. *Illinois*, 470 U. S. 1037, 1038 (1985); *Jones* v. *Illinois*, 464 U. S. 920, 920–921 (1983). Because I continue to believe that our precedents preclude the imposition of this burden on a capital defendant, I dissent.

Rehearing Denied

No. 87–1013. HORNE *v.* UNITED STATES, 485 U. S. 1020;

No. 87–6326. VEALE ET AL. *v.* EGGERT, 485 U. S. 978;

No. 87–6391. HUNZIKER ET AL. *v.* GERMAN-AMERICAN STATE BANK, 485 U. S. 1011;

No. 87–6485. BOLES *v.* ELLIS ET AL., 485 U. S. 1001;

No. 87–6515. CONLEY *v.* ESTATE OF CONLEY, 485 U. S. 1012; and

No. 87–6541. ALSTON *v.* MARINE MIDLAND BANK, N. A., 485 U. S. 1013. Petitions for rehearing denied.

JUNE 9, 1988

Miscellaneous Orders

No. A–896. MORISON *v.* UNITED STATES. Application for continued release from detention, presented to JUSTICE BRENNAN, and by him referred to the Court, denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant the application.

No. A–906. SECRETARY OF COMMERCE ET AL. *v.* KOKECHIK FISHERMEN'S ASSN. ET AL.; and

No. A–907. FEDERATION OF JAPANESE SALMON FISHERIES COOPERATIVE ASSN. *v.* KOKECHIK FISHERMEN'S ASSN. ET AL. Applications for stay of mandate of the United States Court of Appeals for the District of Columbia Circuit and for stay of preliminary injunction of the United States District Court for the District of Columbia, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

JUNE 13, 1988

Appeals Dismissed

No. 87–1080. MARYLAND NATIONAL BANK *v.* MARYLAND STATE DEPARTMENT OF ASSESSMENTS AND TAXATION. Appeal from Ct. App. Md. dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 310 Md. 664, 531 A. 2d 294.

No. 87–1710. BRANSON *v.* LOS ANGELES COUNTY CIVIL SERVICE COMMISSION ET AL. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 87–1734. JOHN R. P. *v.* DEBRA L. B. Appeal from Ct. App. Cal., 5th App. Dist., dismissed for want of substantial federal question.

No. 87–1728. GERMANTOWN SAVINGS BANK ET AL. *v.* CITY OF PHILADELPHIA. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Reported below: 517 Pa. 313, 535 A. 2d 1052.

Certiorari Granted—Vacated and Remanded

No. 86–2035. CHESAPEAKE & OHIO RAILWAY CO. *v.* ALDRIDGE ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Monessen Southwestern R. Co.* v. *Morgan, ante,* p. 330. Reported below: 814 F. 2d 157.

No. 87–417. WILLOUGHBY *v.* CENTRAL ILLINOIS LIGHT CO. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lingle* v. *Norge Division of Magic Chef, Inc., ante,* p. 399. Reported below: 826 F. 2d 1067.

No. 87–723. DOUGHERTY *v.* PARSEC, INC., ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lingle* v. *Norge Division of Magic Chef, Inc., ante,* p. 399. Reported below: 824 F. 2d 1477.

No. 87–851. CLARK ET AL. *v.* MOMENCE PACKING CO. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lingle* v. *Norge Division of Magic Chef, Inc., ante,* p. 399. Reported below: 828 F. 2d 22.

No. 87–859. MARTIN *v.* CARLING NATIONAL BREWERIES, INC., ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lingle* v. *Norge Division of Magic Chef, Inc., ante,* p. 399. Reported below: 823 F. 2d 1031.

No. 87-964. DESOTO *v.* YELLOW FREIGHT SYSTEMS, INC. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lingle* v. *Norge Division of Magic Chef, Inc.*, *ante*, p. 399. Reported below: 820 F. 2d 1434.

No. 87-1099. HANNEKEN *v.* DIXON DISTRIBUTING CO. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lingle* v. *Norge Division of Magic Chef, Inc.*, *ante*, p. 399. Reported below: 822 F. 2d 1091.

No. 87-1103. GERHARDT, AS GUARDIAN AD LITEM FOR KRUEGER *v.* ESTATE OF MOORE. Sup. Ct. Wis. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Clark* v. *Jeter*, *ante*, p. 456. Reported below: 139 Wis. 2d 833, 407 N. W. 2d 895.

No. 87-1189. MAYS *v.* REYNOLDS METAL CO. Sup. Ct. Ala. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lingle* v. *Norge Division of Magic Chef, Inc.*, *ante*, p. 399. Reported below: 516 So. 2d 517.

No. 87-1263. LASTIMOSA *v.* HUGHES AIRCRAFT CO. ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lingle* v. *Norge Division of Magic Chef, Inc.*, *ante*, p. 399. Reported below: 823 F. 2d 1552.

No. 87-5355. STOUT *v.* OKLAHOMA. Ct. Crim. App. Okla. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Maynard* v. *Cartwright*, *ante*, p. 356.

No. 87-5676. HAYES *v.* OKLAHOMA. Ct. Crim. App. Okla. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Maynard* v. *Cartwright*, *ante*, p. 356. Reported below: 738 P. 2d 533.

No. 87-5824. JONES *v.* MARYLAND. Ct. App. Md. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mills* v. *Maryland*, *ante*, p. 367. Reported below: 310 Md. 569, 530 A. 2d 743.

No. 87-6267. WORATZECK *v.* RICKETTS, WARDEN, ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Maynard* v. *Cartwright*, *ante*, p. 356. Reported below: 820 F. 2d 1450.

No. 87-6276. LANKFORD *v.* IDAHO. Sup. Ct. Idaho. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Satterwhite* v. *Texas*, *ante*, p. 249. Reported below: 113 Idaho 688, 747 P. 2d 710.

No. 87-6410. BENNETT *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Satterwhite* v. *Texas*, *ante*, p. 249. Reported below: 742 S. W. 2d 664.

Miscellaneous Orders

No. A-926 (87-796). CITIES SERVICE GAS CO. ET AL. *v.* MOBIL OIL CORP. ET AL. C. A. 10th Cir. Application for recall and stay of mandate, presented to JUSTICE WHITE, and by him referred to the Court, granted pending this Court's action on the petition for writ of certiorari. If the petition for writ of certiorari is denied, this stay is to terminate automatically. Should the petition for writ of certiorari be granted, this stay is to continue in effect pending the sending down of the judgment of this Court.

No. A-946 (87-7185). BYRNE *v.* BUTLER, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

No. A-950. BYRNE *v.* BUTLER, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE STEVENS would grant the application.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

No. D-687. IN RE DISBARMENT OF NAHOOM. Disbarment entered. [For earlier order herein, see 485 U. S. 973.]

No. D-714. IN RE DISBARMENT OF WATKINS. It is ordered that Marshall Word Watkins, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-715. IN RE DISBARMENT OF YOUTS. It is ordered that Charles A. Youts, of Waco, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 106, Orig. ILLINOIS *v.* KENTUCKY. Request of the secretary to the Special Master for approval of final accounting granted. [For earlier order herein, see, *e. g.*, 480 U. S. 903.]

No. 109, Orig. OKLAHOMA ET AL. *v.* NEW MEXICO. Motion of the Special Master for an order authorizing interim compensation and reimbursement of expenses granted, and the Special Master is awarded $16,771.79. [For earlier order herein, see, *e. g.*, 484 U. S. 1023.]

No. 87-548. TRANS WORLD AIRLINES, INC. *v.* INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS. C. A. 8th Cir. [Certiorari granted, 485 U. S. 958.] Motions of Chamber of Commerce of the United States of America, Airline Industrial Relations Conference, and Crossover Flight Attendants for leave to file briefs as *amici curiae* granted.

No. 87-746. MICHAEL H. ET AL. *v.* GERALD D. Ct. App. Cal., 2d App. Dist. [Probable jurisdiction noted, 485 U. S. 903.] Motion of appellee for divided argument denied.

No. 87-1165. CALIFORNIA ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. [Certiorari granted, 485 U. S. 1020.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 87-6219. PEREZ ET UX. *v.* UNITED STATES, 484 U. S. 1057. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* denied.

No. 87-6405. TOMPKINS *v.* TEXAS. Ct. Crim. App. Tex. The order of May 16, 1988 [*ante*, p. 1004], granting the petition for writ of certiorari is amended to read as follows: Certiorari granted limited to Questions 1 and 2 presented by the petition. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 87-6471. LAROCCA *v.* BOARDMAN TOWNSHIP ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 5, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of certiorari in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 87-6855. IN RE MAKER. Petition for writ of mandamus denied.

No. 87-6826. IN RE FAUNCE. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 87-1383. UNITED STATES *v.* HALPER. Appeal from D. C. S. D. N. Y. Probable jurisdiction noted. Reported below: 664 F. Supp. 852.

Certiorari Granted

No. 87–1716. GRANFINANCIERA, S. A., ET AL. *v.* NORDBERG, CREDITOR TRUSTEE FOR THE ESTATE OF CHASE & SANBORN CORP., FKA, GENERAL COFFEE CORP. C. A. 11th Cir. Certiorari granted. Reported below: 835 F. 2d 1341.

No. 87–7028. MISTRETTA *v.* UNITED STATES; and
No. 87–1904. UNITED STATES *v.* MISTRETTA. C. A. 8th Cir. Motions of John Mistretta for leave to proceed *in forma pauperis* granted. Certiorari before judgment granted, cases consolidated, and a total of one hour allotted for oral argument.

Certiorari Denied

No. 87–318. PRATT & WHITNEY AIRCRAFT DIVISION, UNITED TECHNOLOGIES CORP. *v.* BALDRACCHI. C. A. 2d Cir. Certiorari denied. Reported below: 814 F. 2d 102.

No. 87–924. HENRY J. KAISER CO. ET AL. *v.* PAIGE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 826 F. 2d 857.

No. 87–1122. CROWLEY MARITIME CORP. ET AL. *v.* ZIPFEL ET AL.;
No. 87–1391. HALLIBURTON CO. ET AL. *v.* ZIPFEL ET AL.; and
No. 87–1698. ZIPFEL ET AL. *v.* CROWLEY MARITIME CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 832 F. 2d 1477.

No. 87–1364. MILIAN-RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 828 F. 2d 679.

No. 87–1386. DAYTON ET AL. *v.* CZECHOSLOVAK SOCIALIST REPUBLIC ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 266 U. S. App. D. C. 177, 834 F. 2d 203.

No. 87–1434. SCRAPE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87–1494. MARTINEZ-FABELA ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 823 F. 2d 1389.

No. 87–1521. MAHONEY, EXECUTOR OF THE ESTATE OF COX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 831 F. 2d 641.

No. 87-1564. New York State Department of Social Services *v.* Bowen, Secretary of Health and Human Services, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 266 U. S. App. D. C. 296, 835 F. 2d 360.

No. 87-1567. Sun Pipe Line Co. *v.* Environmental Protection Agency. C. A. 1st Cir. Certiorari denied. Reported below: 831 F. 2d 22.

No. 87-1632. Yonkers Board of Education *v.* United States et al.; and

No. 87-1686. City of Yonkers et al. *v.* United States et al. C. A. 2d Cir. Certiorari denied. Reported below: 837 F. 2d 1181.

No. 87-1640. Texas *v.* Crosby. Ct. Crim. App. Tex. Certiorari denied. Reported below: 750 S. W. 2d 768.

No. 87-1656. Consolidated Aluminum Corp. *v.* C. F. Bean Corp. et al. C. A. 5th Cir. Certiorari denied. Reported below: 833 F. 2d 65.

No. 87-1690. Bechtel Power Corp. et al. *v.* United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of United States and Canada, Local 57, et al. C. A. 10th Cir. Certiorari denied. Reported below: 834 F. 2d 884.

No. 87-1694. Rose *v.* Texas. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 716 S. W. 2d 162.

No. 87-1724. Cates, Individually and as Independent Executrix of the Estate of Cates *v.* International Telephone & Telegraph Co. et al. C. A. 5th Cir. Certiorari denied. Reported below: 828 F. 2d 770.

No. 87-1727. Peat Marwick Main & Co. *v.* Tew, Receiver for ESM Group, Inc., et al. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 270.

No. 87-1732. Ducheneaux *v.* Secretary of the Interior et al. C. A. 8th Cir. Certiorari denied. Reported below: 837 F. 2d 340.

No. 87-1736. Molins PLC *v.* Quigg, Assistant Secretary of Commerce. C. A. Fed. Cir. Certiorari denied. Reported below: 837 F. 2d 1064.

No. 87-1745. SOUTH CENTRAL UNITED FOOD & COMMERCIAL WORKERS UNIONS AND EMPLOYERS HEALTH & WELFARE TRUST ET AL. *v.* C & G MARKETS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 836 F. 2d 221.

No. 87-1746. SOUTHLAND CORP. ET AL. *v.* SUPERIOR COURT OF THE COUNTY OF ALAMEDA (KEATING ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 87-1747. BENTON *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 206 Conn. 90, 536 A. 2d 572.

No. 87-1748. NEWSDAY, INC. *v.* SISE, CHIEF ADMINISTRATIVE JUDGE, OFFICE OF COURT ADMINISTRATION OF THE STATE OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 71 N. Y. 2d 146, 518 N. E. 2d 930.

No. 87-1752. DEWEERTH *v.* BALDINGER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 836 F. 2d 103.

No. 87-1753. SMITH *v.* SMITH ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 365 Pa. Super. 195, 529 A. 2d 466.

No. 87-1763. BOZEK *v.* DANNING, CHAPTER 7 TRUSTEE. C. A. 9th Cir. Certiorari denied. Reported below: 836 F. 2d 1214.

No. 87-1775. AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA *v.* ATLANTIC PERMANENT FEDERAL SAVINGS & LOAN ASSN. C. A. 4th Cir. Certiorari denied. Reported below: 839 F. 2d 212.

No. 87-1777. BARANSKI ET AL. *v.* CHICAGO MERCANTILE EXCHANGE. C. A. 7th Cir. Certiorari denied. Reported below: 836 F. 2d 271.

No. 87-1779. LARSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 835 F. 2d 169.

No. 87-1788. ROSE *v.* FULTZ. C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 1380.

No. 87-1793. READING CO. *v.* CJI INDUSTRIES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 686.

No. 87–1805. Komjathy *v.* Administrator, Federal Aviation Administration, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 266 U. S. App. D. C. 56, 832 F. 2d 1294.

No. 87–1827. LoDuca *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 836.

No. 87–1844. Behar *v.* Southeast Bank Trust Co. et al. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 512 So. 2d 1160.

No. 87–1850. J. E. T. S., Inc. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 838 F. 2d 1196.

No. 87–6322. Pendleton *v.* Turner et al. C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 40.

No. 87–6379. O'Byrne *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 835 F. 2d 285.

No. 87–6389. Downs *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 87–6476. Harp *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 468.

No. 87–6511. Parkhurst *v.* Shillinger et al. C. A. 10th Cir. Certiorari denied.

No. 87–6687. Wall *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 1208.

No. 87–6699. Ruffin *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 524 A. 2d 685.

No. 87–6737. Doyle *v.* United States Parole and Probation Commission. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1092.

No. 87–6756. Allen *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 841 F. 2d 1120.

No. 87–6768. Petty *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 828 F. 2d 2.

No. 87–6785. Tomburello et ux. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 838 F. 2d 474.

No. 87–6809. MURR *v.* NELSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 843 F. 2d 1391.

No. 87–6815. RODGERS *v.* MARKEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 1215.

No. 87–6828. HORTON *v.* BARTON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1093.

No. 87–6834. FIELDS *v.* STEINBRENNER ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–6836. PINKERMAN *v.* SEITER, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 1215.

No. 87–6838. MENA *v.* SAN DIEGO COUNTY DEPARTMENT OF SOCIAL SERVICES. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 87–6840. BATTLE *v.* CALHOUN COUNTY SHERIFF'S DEPARTMENT. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 470.

No. 87–6846. CORTEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 841 F. 2d 456.

No. 87–6851. UZAREVIC *v.* MCMACKIN, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied.

No. 87–6856. WHITNEY *v.* CHARLTON METHODIST HOSPITAL. C. A. 5th Cir. Certiorari denied. Reported below: 836 F. 2d 1345.

No. 87–6882. OLIVER *v.* HENMAN. C. A. 7th Cir. Certiorari denied.

No. 87–6935. MONTGOMERY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 836.

No. 87–6939. HOLMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 2d 1175.

No. 87–6952. SHANNON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 836 F. 2d 1125.

No. 87-6954. THERON *v.* UNITED STATES MARSHAL. C. A. 9th Cir. Certiorari denied. Reported below: 832 F. 2d 492.

No. 87-652. ALBERTA GAS CHEMICALS LTD. ET AL. *v.* E. I. DU PONT DE NEMOURS & CO. ET AL. C. A. 3d Cir. Motion of petitioners to file reply brief under seal granted. Certiorari denied. Reported below: 826 F. 2d 1235.

No. 87-1047. NATIONWIDE CORP. ET AL. *v.* HOWING CO. ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 826 F. 2d 1470.

No. 87-1370. N. W. ENTERPRISES, INC. *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari and reverse the judgment of conviction.

No. 87-1513. SECURITIES INDUSTRY ASSN. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN and JUSTICE O'CONNOR would grant certiorari. Reported below: 839 F. 2d 47.

No. 87-1581. KURTZ *v.* BAKER, SECRETARY OF THE TREASURY, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 265 U. S. App. D. C. 1, 829 F. 2d 1133.

No. 87-1617. NEWMAN ET AL. *v.* UNIVERSAL PICTURES, A DIVISION OF UNIVERSAL CITY STUDIOS, INC., ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 813 F. 2d 1519.

No. 87-1702. CHATTEM, INC. *v.* BAILEY. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 149.

JUSTICE WHITE, dissenting.

The question here is—when an initial money judgment for a plaintiff is vacated, but later reinstated—what date should be used when calculating an award of postjudgment interest: the date of the first judgment for the plaintiff or the date of the later award?

In this diversity action, respondent sued petitioner claiming fraud and breach of contract. The jury reached a verdict for respondent, and awarded damages. However, on appeal, the Court of Appeals vacated the judgment, finding that the instructions given to the jury had been inadequate. 684 F. 2d 386, 396–397 (CA6 1982). A second trial ensued, where the jury again ruled for respondent; the jury's verdict was even greater this time than was the initial award. This second judgment was affirmed on appeal. 779 F. 2d 49 (1985).

Respondent then asked the District Court to amend its judgment order, so that the postjudgment interest the District Court had awarded respondent would run from the date of the original judgment in the case, and not the date of the judgment following retrial. Petitioner opposed this request, noting that the statute which provides for postjudgment interest in civil cases, 28 U. S. C. § 1961, stipulates that interest "shall be calculated from the date of the entry of the judgment." Since the initial judgment had been invalidated on appeal, only the date of entry of the second judgment could be the basis for calculating postjudgment interest under § 1961, petitioner argued. The District Court ruled for petitioner on this issue, but the Court of Appeals reversed and held that postjudgment interest would be calculated from the date of the initial judgment. 838 F. 2d 149, 153 (CA6 1988).

In so doing, the Sixth Circuit noted that petitioner's position had been accepted by the Second, Eighth, and Tenth Circuits. *Ibid.* See, *e. g.*, *Ashland Oil, Inc.* v. *Phillips Petroleum Co.*, 607 F. 2d 335, 336 (CA10 1979); *Hysell* v. *Iowa Public Service Co.*, 559 F. 2d 468, 476–477 (CA8 1977); *Powers* v. *New York Central R. Co.*, 251 F. 2d 813, 818 (CA2 1958). The Seventh Circuit likewise has adopted a similar reading of § 1961. See *Harris* v. *Chicago Great Western R. Co.*, 197 F. 2d 829, 836 (1952). These courts all conclude that the phrase "date of the entry of the judgment" in § 1961 must be read narrowly, and cannot refer to a judgment later vacated on appeal.

By contrast, the Sixth Circuit in this case—and the First, Third, Fifth, and Ninth Circuits in other cases—have adopted a broader reading of § 1961. See, *e. g.*, 838 F. 2d, at 153–155; *Poleto* v. *Consolidated Rail Corporation*, 826 F. 2d 1270, 1280–1281 (CA3 1987); *Affiliated Capital Corp.* v. *Houston*, 793 F. 2d 706, 710 (CA5 1986); *Turner* v. *Japan Lines, Ltd.*, 702 F. 2d 752, 755 (CA9 1983); *United States* v. *Michael Schiavone & Sons, Inc.*, 450 F. 2d 875, 876–877 (CA1 1971). These courts all have concluded that the purposes of § 1961 are best effectuated by giving a prevailing plaintiff postjudgment interest from the date of the original judgment in his favor.

Because this case presents a conflict among the Circuits over the proper application of an oft-used federal statute (28 U. S. C. § 1961), I would grant the petition for certiorari.

No. 87–1725. Lynaugh, Director, Texas Department of Corrections *v.* Cordova. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 838 F. 2d 764.

No. 87–1765. Mellas et al. *v.* Walsh. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 837 F. 2d 789.

No. 87–1781. Dugger, Secretary, Florida Department of Corrections *v.* Miller. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 838 F. 2d 1530.

No. 87–1739. D & S Auto Parts, Inc. *v.* Schwartz et al. C. A. 7th Cir. Certiorari denied. Justice Stevens took no part in the consideration or decision of this petition. Reported below: 838 F. 2d 964.

No. 87–1780. Burt *v.* Justices of the Supreme Court of Idaho et al. C. A. 9th Cir. Certiorari denied. Justice Kennedy took no part in the consideration or decision of this petition. Reported below: 835 F. 2d 1434.

No. 87–6008. Fisher *v.* Oklahoma. Ct. Crim. App. Okla.;
No. 87–6125. Spruill *v.* North Carolina. Sup. Ct. N. C.;
No. 87–6196. Gardner *v.* North Carolina. Gen. Ct. Justice, Super. Ct. Div., Forsyth County, N. C.;
No. 87–6365. Knox *v.* Texas. Ct. Crim. App. Tex.;
No. 87–6460. Rupe *v.* Washington. Sup. Ct. Wash.;
No. 87–6644. Booker *v.* Dugger, Secretary, Florida Department of Corrections. Sup. Ct. Fla.;
No. 87–6674. Holden *v.* North Carolina. Sup. Ct. N. C.;
No. 87–6774. Miller *v.* Texas. Ct. Crim. App. Tex.; and
No. 87–6845. Lincecum *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 87–6008, 736 P. 2d 1003

and 739 P. 2d 523; No. 87–6125, 320 N. C. 688, 360 S. E. 2d 667; No. 87–6365, 744 S. W. 2d 53; No. 87–6460, 108 Wash. 2d 734, 743 P. 2d 210; No. 87–6644, 520 So. 2d 246; No. 87–6674, 321 N. C. 125, 362 S. E. 2d 513; No. 87–6774, 741 S. W. 2d 382; No. 87–6845, 736 S. W. 2d 673.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 87–1463. BROWN *v.* BROWN & ROOT U. S. A. INC. ET AL., 485 U. S. 1017;

No. 87–6418. PARIS *v.* STATE DIVISION OF CORRECTION ET AL., 485 U. S. 1011;

No. 87–6492. ADAMS *v.* DEPARTMENT OF THE NAVY, 485 U. S. 1023;

No. 87–6539. WHITAKER *v.* PETERSON ET AL., 485 U. S. 1018;

No. 87–6544. WHITAKER *v.* PASCARELLA ET AL., 485 U. S. 1018;

No. 87–6548. SEN GUPTA *v.* METCO, INC., 485 U. S. 1023;

No. 87–6564. SISCO *v.* COUNTY OF LOS ANGELES ET AL., 485 U. S. 1023; and

No. 87–6589. MINGLEDOLPH *v.* MCKEAN ET AL., 485 U. S. 1031. Petitions for rehearing denied.

No. 94, Orig. SOUTH CAROLINA *v.* BAKER, SECRETARY OF THE TREASURY, 485 U. S. 505; and

No. 87–176. WHITE ET AL. *v.* ELROD, SHERIFF OF COOK COUNTY, ET AL., 484 U. S. 924. Petitions for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of these petitions.

No. 86–1712. TRANSAMERICAN NATURAL GAS CORP. *v.* UNITED STATES DEPARTMENT OF THE INTERIOR ET AL., 484 U. S. 871. Motion for leave to file petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

JUNE 16, 1988

Dismissals Under Rule 53

No. 87–1375. REIFENHAUSER GMBH & CO. MASCHINENFABRIK ET AL. *v.* FMC CORP. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 830 F. 2d 770.

No. 87–786. NORTHERN NATURAL GAS CO. ET AL. *v.* MOBIL OIL CORP. ET AL. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 818 F. 2d 730.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1063 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

LUCAS ET AL. *v.* TOWNSEND ET AL.

ON APPLICATION FOR STAY

No. A–898. Decided May 30, 1988

An application to enjoin a school bond referendum election scheduled for May 31, 1988, is granted, pending the timely docketing of an appeal. The Bibb County, Georgia, Board of Education (Board), which had originally voted to place the referendum on the March 1988 primary election ballot, postponed the referendum until May when it would be voted on with a second bond issue. Applicants asked the Board to rescind its decision, arguing that changing the date from a primary day would adversely affect voter turnout, that the bond issues had been combined in an effort to manipulate the minority vote, and that the May referendum had not been submitted for preclearance as required by § 5 of the Voting Rights Act, which provides that certain jurisdictions may not implement any election practices different from those in force on November 1, 1964, without first obtaining approval from, *inter alia*, the Attorney General. Subsequently, the Board applied for preclearance—a procedure not yet completed—and applicants sought an injunction in the District Court to prohibit the Board from holding the election on the ground that it had not been precleared. A three-judge court denied the request, concluding, among other things, that the referendum was not a "change" covered by § 5, a conclusion that is problematic under this Court's precedents. See, *e. g.*, *NAACP* v. *Hampton County Election Comm'n*, 470 U. S. 166. It is likely that four Members of the Court would vote to note probable jurisdiction, and there is a fair prospect that the Court would vote to reverse the judgment below. Moreover, irreparable harm would likely flow from a denial of injunctive relief because letting the election go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect, despite their diligence in seeking to adjudicate their rights before the election; and because the effect of even a subsequently invalidated election is likely to be most disruptive. Also, the burden an injunction places on defendants

can be ascribed to their own failure to seek preclearance sufficiently in advance of the election. On balance, the equities favor applicants.

JUSTICE KENNEDY, Circuit Justice.

This is an application to enjoin a bond referendum election scheduled for May 31, 1988, in Bibb County, Georgia. The applicants are five black citizens registered to vote in Bibb County. On May 27, 1988, a three-judge District Court for the Middle District of Georgia declined to issue an injunction, concluding that the applicants had failed to establish that holding the election now contemplated would violate § 5 of the Voting Rights Act, 79 Stat. 439, as amended, 42 U. S. C. § 1973c. The United States has submitted, and I have reviewed, a memorandum advising me that it supports the applicants' request for immediate injunctive relief. I have also reviewed and considered a submission by the respondents in opposition.

I

On December 17, 1987, the Bibb County Board of Education resolved to place a bond referendum on the March 8, 1988, ballot, a primary election date popularly known as "Super Tuesday." The bond issue was intended to help defray the cost of air conditioning certain local schools. The Board subsequently voted, on January 4, 1988, to rescind its prior resolution. It resolved to postpone the referendum until May 31, 1988, when it would be voted on with a second bond issue for the building of a new high school.

On March 7, 1988, counsel for the applicants requested the Board to rescind its vote calling for the May 31 referendum. In his letter to the Board, counsel argued that changing the date of the election from a primary day would adversely affect minority voter turnout. The letter also argued that the two bond issues had been combined in an effort to manipulate the minority vote, and noted that the call for the May 31 referendum had not yet been submitted for preclearance to the Voting Section of the Civil Rights Division of the United States Department of Justice.

On March 30, 1988, the state authorities applied to the Voting Section of the Civil Rights Division for preclearance. On May 25, 1988, the Civil Rights Division responded that "the information sent is insufficient to enable us to determine that the proposed change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," and asked for additional information, including a "detailed explanation of the reason for choosing May 31, 1988, as the bond election date."

The Civil Rights Division also requested that state authorities respond to allegations (i) that the Super Tuesday date had been abandoned because the turnout of black voters was expected to be high on that date, and (ii) that the two bond issues were consolidated to prevent black voters from voting separately on each of the proposed projects. Finally, the Division noted that the Attorney General has 60 days to consider a completed submission, and that the period would begin to run upon receipt by the Division of all necessary information.

The applicants sought an injunction prohibiting the Board from holding the election on the ground that the election had not been precleared by the Attorney General in accordance with § 5. On May 27, 1988, the three-judge court denied the request for an injunction. The court stated that it was required to determine whether the actions proposed "'have the potential for diluting the value of the Negro vote and are within the definitional terms of § 5.'" Civ. Action No. 88-166-1 (MD Ga., May 27, 1988) (slip op., at 3), quoting *Georgia* v. *United States*, 411 U. S. 526, 534 (1973). It also adverted to the Attorney General's regulation providing that any discretionary setting of the date for a special election, which is defined to include a referendum, is subject to the preclearance requirement, 28 CFR § 51.17 (1987), and acknowledged that the Attorney General had not precleared the referendum.

The court concluded that the applicants had failed to present evidence that the procedures to be utilized in the upcoming election differ from those in use at the time the Act became law. Accordingly, it concluded that the referendum was not a "change" covered by § 5. While the court noted that the Attorney General's regulation provides otherwise, it held that the regulation is not supported by the language of § 5. Alternatively, the court concluded that the applicants had failed to show that holding the referendum on May 31, 1988, "has even the potential for diluting the minority vote." Civ. Action No. 88–166–1, *supra*, slip op., at 4–5. Accordingly, the court declined to issue the injunction prayed for by the applicants. This application followed.

II

The principles that control a Circuit Justice's consideration of in-chambers applications for equitable relief are well settled. As a threshold consideration, it must be established that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. See *White* v. *Florida*, 458 U. S. 1301, 1302 (1982) (Powell, J., in chambers); *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (1980) (BRENNAN, J., in chambers). I must also be persuaded that there is a fair prospect that five Justices will conclude that the case was erroneously decided below. See, *e. g.*, *Graves* v. *Barnes*, 405 U. S. 1201, 1203 (1972) (Powell, J., in chambers). Finally, an applicant must demonstrate that irreparable harm will likely result from the denial of equitable relief. In appropriate cases, a Circuit Justice will balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public. See *Rostker* v. *Goldberg*, *supra*, at 1308; *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1304 (1974) (Powell. J., in chambers).

The substantiality of the federal questions presented by the case cannot be doubted. Section 5 provides that certain jurisdictions, including the one in which this case arose, may not implement any election practices different from those in force on November 1, 1964, without first obtaining approval from the United States District Court for the District of Columbia or, alternatively, from the Attorney General. Neither statutory requirement has been met in this case. The three-judge court concluded, however, that the discretionary setting of the date of a special election is not a "change" covered by the statute, notwithstanding the provision in 28 CFR § 51.17 (1987) to the contrary. The conclusion is most problematic under our precedents, see, *e. g., NAACP* v. *Hampton County Election Comm'n*, 470 U. S. 166, 178 (1985) (noting that it could not seriously be disputed that "a change in the date of an election, if effected by statute, requires approval by the Attorney General under § 5"), and I have concluded that four Members of the Court would likely vote to note probable jurisdiction and that there is a fair prospect that the Court would vote to reverse the judgment below.

I am further persuaded that irreparable harm likely would flow from a denial of injunctive relief. Permitting the election to go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect, despite their obvious diligence in seeking an adjudication of their rights prior to the election. Even if the election is subsequently invalidated, the effect on both the applicants and respondents likely would be most disruptive. Further, although an injunction would doubtless place certain burdens on the respondents, such burdens can fairly be ascribed to the respondents' own failure to seek preclearance sufficiently in advance of the date chosen for the election. On balance, I conclude that the equities favor the applicants. Today I have entered an order enjoining the election, pending the timely docketing of an appeal.

MORISON *v.* UNITED STATES

ON APPLICATION FOR CONTINUED RELEASE FROM DETENTION

No. A–896. Decided June 2, 1988

Application for continued release from detention after conviction—on charges of espionage and theft of Government property—pending consideration of a yet-to-be-filed petition for writ of certiorari is denied because, under 18 U. S. C. § 3143(b), applicant Morison has not shown that his appeal is "likely to result in reversal" with respect to all the counts for which imprisonment was imposed.

Application denied.

CHIEF JUSTICE REHNQUIST, Circuit Justice.

Samuel Loring Morison was convicted in the District Court of two counts each of espionage, in violation of 18 U. S. C. §§ 793(d), (e), and theft of Government property, in violation of 18 U. S. C. § 641. His conviction was affirmed on appeal by the United States Court of Appeals for the Fourth Circuit, 844 F. 2d 1057 (1988), and he now asks that he be allowed to remain free on bond pending the consideration of his yet-to-be-filed petition for writ of certiorari. The statutory standard for determining whether a convicted defendant is entitled to be released pending a certiorari petition is clearly set out in 18 U. S. C. § 3143(b) (1982 ed., Supp. IV), and the only real issue in this application is whether Morison's appeal "raises a substantial question of law or fact likely to result in reversal, an order for a new trial, or a sentence that does not include a term of imprisonment." I agree with the courts below, however, that regardless of whether Morison has raised a "substantial question" with respect to the propriety of his conviction under the Espionage Act, he has not done so with respect to his conviction for theft of Government property under § 641. Because Morison has not shown that his appeal is "likely to result in reversal" with respect to all the counts for which imprisonment was imposed, see *United*

States v. *Bayko*, 774 F. 2d 516, 522 (CA1 1985), his application is denied.

DOE *v.* SMITH

ON APPLICATION FOR WRIT OF INJUNCTION

No. A–954. Decided June 15, 1988

Applicant's application for an order enjoining Jane Smith from obtaining an abortion of their unborn child is denied. There is serious doubt whether there is a federal remedy for this claim since Smith's decision to obtain an abortion can be carried out without any state action. Applicant's claim—that the respective interests of the parties should be balanced by a neutral tribunal before Smith's decision is implemented—provides a particularly weak basis for invoking the extraordinary judicial relief sought. Such balancing has already been done by an Indiana trial court, which found that applicant's interests did not outweigh Smith's constitutionally protected right to abort the fetus. In addition, the State Supreme Court has indicated that there is a presumption of correctness to the trial court's decision in such matters. Moreover, there is some danger that a delay in implementing Smith's decision may increase her risk of harm. There is also substantial doubt whether the State Supreme Court has issued a final decision providing a basis for this Court's appellate jurisdiction.

JUSTICE STEVENS, Circuit Justice.

Applicant has filed an application with me as Circuit Justice to enter an order enjoining Jane Smith from obtaining an abortion of their unborn child. For the reasons hereinafter stated, the application is denied.

Applicant initiated proceedings seeking this relief from the Elkhart, Indiana, Superior Court on May 31, 1988. After granting a temporary restraining order without notice, the Superior Court held an evidentiary hearing, made detailed findings of fact, conclusions of law, and filed a written opinion. The findings recite, in part:

> "5) That the unrebutted testimony from both the parties is that the Plaintiff is the natural father of the unborn child of the mother.
>
> "6) That the Plaintiff and the Defendant have never been married and do not contemplate marriage.

"7) That the child was conceived in April of 1988 during a liaison between the mother and the father, which commenced in February or March and terminated shortly after conception.

"8) That at the time conception occurred, the father was separated from his wife of six months, and upon leaving the Defendant he became reunited with his first wife.

"9) That the father has two children, one his biological issue, with his first wife.

. . . . .

"12) That the father has been sporadically employed at low-paying jobs for the last eighteen months.

"13) That the mother has testified she is physically, emotionally and economically unwilling to bear the child.

"14) That the parties mutually agree that there is no foreseeable possibility of their reuniting in any way."

In his opinion, the trial judge stated, in part:

"While the Court has carefully weighed the testimony, it is apparent that although the Plaintiff has expressed a legitimate and apparently sincere interest in the unborn fetus, his interest would not be sufficient to outweigh the Constitutionally protected right of the Defendant to abort her child. It would appear from the *Danforth* decision that in order to require the mother to carry a child to term against her wishes, the father must demonstrate clear and compelling reasons justifying such actions. In this case, the father has failed to do so. Reviewing the undisputed facts presented in this Cause, the Court is unable to find that the interests of the Plaintiff outweigh the interest of the Defendant. It is significant that, among other facts, the evidence discloses the parties are not married, that there is no suggestion they will ever reunite, that the Plaintiff is able to father other children and, in fact, has other children, and that the Plaintiff has showed substantial instability in his marital and roman-

> tic life. Based upon the Plaintiff's romantic patterns over the last eight months, it would be impossible for the Court to predict the stability of his family unit at the time of birth.
>
> "In summary, even if the *Danforth* decision permits the Court to balance the interest of the father of the unborn child against those of the mother, in this particular case the balancing would be in the mother's favor."

On June 14, 1988, the Indiana Supreme Court accepted transfer of the case, based on its emergency nature, but denied a petition for a stay. In doing so it relied on "the presumption of the validity accorded all trial court judgments," this Court's decision in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 67–72 (1976), and its conclusion that there was not a sufficient likelihood that John Doe would prevail on the merits of his appeal to justify a stay.

In addition to the reasons set forth by the trial court and the Indiana Supreme Court, I would add that I have serious doubts concerning the availability of a federal remedy for this claim in view of the fact that Jane Smith's decision to obtain an abortion can be carried out without any action on the part of the State of Indiana or any other state governmental subdivision. Applicant does not argue that he has an absolute right to veto Jane Smith's decision, but rather contends that the respective interests of the parties should be balanced by a neutral tribunal before her decision is implemented. Since such balancing has already been done by the trial court, since the Indiana Supreme Court has indicated that there is a presumption of correctness to the decision of the trial court in a matter of this kind, and since there is some danger that a delay in implementing Jane Smith's decision may increase the risk of physical or emotional harm to Smith, applicant's claim provides a particularly weak basis for invoking the extraordinary judicial relief that is sought. Indeed, I have substantial doubt whether there has yet been a final decision by the highest court of the State of Indiana that would provide a basis for appellate jurisdiction in this Court.

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